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FTC AND INTERNATIONAL ANTITRUST LAWS

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSUMER

OF THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION UNITED STATES SENATE

ONE HUNDRED FIRST CONGRESS

SECOND SESSION

ON

FEDERAL TRADE COMMISSION AND INTERNATIONAL ANTITRUST LAWS

JULY 19, 1990

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CONTENTS

	Page
Opening statement by Senator Bryan	1
Opening statement by Senator McCain	2
Opening statement by the Chairman	3
Opening statement by Senator Gorton	6

LIST OF WITNESSES

Arquit, Kevin J., Director, Bureau of Competition, FTC	7
Prepared statement	9
Constantine, Lloyd, assistant attorney general in charge, Antitrust Bureau, State of New York	22
Prepared statement	27
Letter of August 1, 1990	51
Dunlap, R. Terren, CEO, Go-Video, Inc.	52
Huffman, Stanley E., chairman, S. E. Huffman Corp	72
Prepared statement	74
Mack, Jim, vice president, government relations for the trade, NMTBA	109
Morris, Julian C., president, Automotive Parts and Accessories Assn., Inc	62
Pickens, T. Boone, Jr., general partner, Mesa Limited Partnership	53
Prepared statement	56
Reid, Hon. Harry, U.S. Senator from Nevada	3
Turner, Brian, executive assistant to the president, Industrial Union Department, AFL-CIO; accompanied by Thomas R. Howell, counsel	84
Prepared statement	88

ADDITIONAL ARTICLES, LETTERS, AND STATEMENTS

American Electronics Assn., statement	112

FTC AND INTERNATIONAL ANTITRUST ISSUES

THURSDAY, JULY 19, 1990

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
SUBCOMMITTEE ON THE CONSUMER,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:30 a.m. in room 253, Russell Senate Office Building, Hon. Richard H. Bryan [chairman of the subcommittee], presiding.

Staff members assigned to this hearing: Linda Lance and Moses Boyd, staff counsels and Sherman Joyce, minority staff counsel.

OPENING STATEMENT BY SENATOR BRYAN

Senator BRYAN. Today America's industrial base is in peril. The American machine tool industry has been ravaged by foreign competition. The percentage of imports in that industry has increased from 39 percent to 59 percent in just the past six years.

In the semiconductor market we have taken a terrible beating. In the last decade the U.S. share has declined from 60.7 percent to 35 percent, while Japan's share has increased 26.4 percent, to 52 percent. And the history of the U.S. television industry is a tale of disaster.

As recently as 1970, American industry held 90 percent of the color television market in this country. Today we barely hold on to 10 percent.

In the auto parts industry, Japan dominates roughly 50 percent of the content of all cars sold in America. The picture is just as grim in the area of exports to Japan. In 1989, U.S. auto makers sold only 19,000 cars and trucks in Japan, while the Japanese sold 3.8 million cars in the United States.

In 1989 Japan imported only $481 million worth of machine tools from all other countries, compared to the United States machine tool imports of $2.4 billion, West German imports of $1.4 billion and French imports of $1.1 billion.

Many in the business community claim that one of the leading causes in this litany of decline is the anti-competitive strategies of their foreign rivals. Immune from American law, backed by government policy, foreign firms have preyed with impunity on American markets, little worried that their illegal strategies will be called into account.

Our business leaders point to arrangements in Japan such as the keiretsu system of interlocking shareholding, interlocking directorates, and exchange of personnel and financial commitments, that

result in monopolistic control over pricing and availability of markets and products.

In the June 1990 report of the U.S.-Japan working group, on the structural impediments initiative, the Japanese delegation acknowledged, and I quote, "that there is a view that certain aspects of the keiretsu relationships also promote preferential group trade, negatively affect foreign direct investment in Japan and may give rise to anti-competitive business practices."

It is a responsibility of the Federal Government to ensure that American industry and American workers have fair access to the international marketplace and that American industry and American business and American workers are not victimized by predatory practices of foreign competition at home.

Our antitrust laws in this country have historically served American industry and American consumers well. Today we are in the process of re-evaluating these policies, in light of a fiercely competitive global economy. For many American firms to participate in joint research and production ventures is a constructive response to a marketplace which was once dominated by domestic firms and which has become a jungle of foreign and domestic firms competing for customers.

To those who say we should adopt the Japanese policy of encouraging industrial baronies, I can only say, look at the Japanese consumer. We know that under the keiretsu policy in Japan, the consumer is last in line. The web of corporations so effective in seizing market share from American firms is also a great anti-competitive machine.

Bids are rigged, products are dumped below market price and competitors are driven out, all on the backs of Japanese consumers who, on average, pay 39 percent more for products than their American counterparts.

This is not my vision for American business, for American workers or American consumers. And it should not be the policy of the Federal Government.

Our challenge then, it seems to me, is clear: To maintain the protection afforded by our own antitrust laws to American consumers; at the same time, to ensure that American business and American workers are not disadvantaged by anti-competitive practices by an alliance of foreign corporations and their governments.

Our focus this morning will be an examination of American antitrust laws and their applicability to those anti-competitive practices, devised and executed beyond our shores, but directly undermining American business, which in my judgment constitute a long-term threat to our consumers. I am pleased now to yield to my colleague, Senator McCain, who joins us this morning.

OPENING STATEMENT BY SENATOR McCAIN

Senator McCAIN. Thank you, Mr. Chairman. I think you have pretty well summarized the situation, and I know our colleague from Nevada—our other colleague from Nevada's long involvement in this issue has been very important and, indeed, I think he will play a key role in us arriving at some solutions, hopefully.

One thing I would like to complement you on is our panels that we have today. I think we—they are going to provide us with some very valuable and important insight, one of whom I know just returned from the major battle in Japan, Mr. Pickens, and Mr. Dunlap, and Go-Video, have certainly—bear considerable scars from their battle, their many year running battle with the Japanese, and I will not prolong this except to say that I think this hearing is very important, and I think that if we are going to truly have a level playing field with our trading partners—and they are our partners, not only the Japanese but other nations throughout the world—that we have to examine these issues very carefully. Thank you for holding this hearing and thank you for the very fine panel of witnesses we have this morning.

Senator BRYAN. Thank you very much, Senator McCain, for your comments, and obviously we will look forward to your participation this morning because I know of your own long-term interest and concern.

I have a statement that Senator Hollings would like to have included in the hearing record.

[The statement follows:]

OPENING STATEMENT BY THE CHAIRMAN

With this hearing today, I am pleased to see the committee continue its examination of the competitiveness of American business by considering what role the antitrust laws should play in promoting our competitiveness. It is no secret that too many of our most important industries—machine tools, electronics, semiconductors, and automobiles, for example—are losing market share to foreign competition. There have been serious allegations made that this loss is due in part to collusive practices by foreign countries that may be illegal in this country.

These are complicated issues, and the facts are not always readily available. However, we must try to get to the bottom of the allegations, because the consequences are often life or death for American businesses. For this reason, I wrote to the FTC a short while ago to ask that it investigate the Japanese keiretsu system as it applies to the auto parts industry. I look forward to hearing about the FTC's progress in this and other related areas, and await the outcome of that investigation.

In addition, it is very important that we insure that our antitrust laws work effectively to prevent improper activity by both foreign and domestic businesses. We also need to make sure that the FTC and other antitrust enforcers have the tools they need to require compliance with the laws. This hearing today is an important step in this regard, and I look forward to productive work on this issue.

Senator BRYAN. I am delighted this morning to welcome my senior colleague, the distinguished Senator from the State of Nevada, Harry Reid.

STATEMENT OF HON. HARRY REID, U.S. SENATOR FROM NEVADA

Senator REID. Chairman Bryan, Senator McCain, we all have a lot to do with our various Committee assignments and it is not often that another Senator is envious of not being able to participate in a hearing. And certainly, I agree with you, Senator McCain, the hearing today should be most productive. I am envious that I will not have the opportunity to sit through the entire panel because it will be illuminating.

Mr. Chairman, there is nothing new under the sun. The news stories of the 1990's sound like stories from the 1930's. There are new reports of tension regarding the border between Germany and Poland. Ethnic rivalries threaten to rip apart the Baltic states, and

also a few powerful Japanese conglomerates are threatening the world economic order.

Before World War II, the Japanese economy was organized in Zaibatsus. Manufacturing firms were horizontally concentrated under the control of a few very powerful families. But immediately after the war, these conglomerates were broken up, but they were eventually allowed to reappear in a similar system, but with a different name. As you have mentioned, Mr. Chairman, it is now called keiretsu.

Until now, the existence of keiretsu has been largely ignored. Over the past 40 years the story has been one of Japan's economic miracle. Little attention was paid to how this fantastic growth occurred; but now that Japan is the world's No. 1, in some people's book, economic power, we are beginning to learn about the economic forces that made the miracle possible.

Chief among these forces is the keiretsu. Today you will learn firsthand how powerful these organizations really are. As Senator McCain indicated, T. Boone Pickens has received astonishing treatment from a company at the bottom of the Toyota keiretsu. His experience is one that any foreigner who wishes to participate in the Japanese economy will have.

If you are not Japanese, you cannot participate. And even if you are Japanese, unless you play by the anti-competitive rules of the keiretsu, you can be no more than a very minor figure.

And maybe, Mr. Chairman, the Japanese are happy with the keiretsu system. That is up to the Japanese government and people to decide. However, we in the United States and other nations, with relatively open markets, are not and cannot be happy with this arrangement.

The Japanese economic juggernaut is awe-inspiring and sometimes frightening. If we are to compete with it, we have to confront it from every angle. We must make United States industries more competitive. We must improve government-industry cooperation. We must seek changes in the Japanese economy through unilateral and multilateral talks.

We must vigorously enforce U.S. antitrust laws against keiretsu who have the privilege to participate in our open economy. And, finally, we must impose the same restrictions on Japanese investors that Japanese impose upon Americans.

Mr. Chairman, on May 22, I introduced legislation to accomplish this goal; S-2670, the Fair Investment Act of 1990. This legislation would stop the double standard that allowed Japan and other countries to take our money without giving anything in return.

This legislation would use the carrot-and-stick approach. If foreign companies practice fair investment and do not discriminate against us, we will not retaliate against them, but if they discriminate against our businessmen, then they should not expect to get a free ride in this country.

It is a question, really, of fairness, that is all. If they play fair, so will we.

To achieve this reciprocal relationship, the Fair Investment Act amends Section 301(C) of the Trade Act of 1974 to authorize reciprocal responses to foreign acts, policies and practices that deny national treatment to the United States investments. My bill merely

seeks the creation of a level playing field, that has been talked about but has never materialized.

The Administration, like its predecessor, uses open investment and free trade as the two policy components to cure our foreign trade ills. But unfortunately, and I think this Administration is beginning to realize it, the pursuit of these policies has done nothing to improve our staggering trade deficit.

And I think I know one real good reason. Only our government has a truly open and free trade policy. The Japanese government does everything in its power to preserve, protect and defend Japanese industry. It is time we in the United States did the same thing for our own economy.

We in Congress must pass legislation to encourage a reciprocal trade relationship, free trade but also fair trade. The policymakers and the administration must implement fair investment and fair trade policies. Failing to place Japan on the ""Super 301" list demonstrates they have not yet learned the wisdom of those kinds of policies.

Mr. Chairman, Congress is watching the implementation of our trade policies very carefully, and it appears Americans keep getting shortchanged in these matters.

Therefore, it is time to give our trade negotiators the proper tools. I think my legislation does just that. It puts a nation's money where its mouth is. If a nation really has free trade laws, then it will receive the benefit of America's open market. If it places restrictions on foreign investment on its own economy, then America will place the same restrictions on investments here.

This is a reasonable response to a situation that has grown out of control, one that perhaps can put an end to Japan's unfair business practices. Thank you, Mr. Chairman.

Senator BRYAN. Senator Reid, we thank you very much for your testimony this morning. You are invited to join us, stay as long as you can with us in this proceeding.

Senator MCCAIN. Mr. Chairman, do I ask——

Senator BRYAN. You certainly may. I yield now to Senator McCain.

Senator MCCAIN. Thank you Senator Reid. Senator Reid, we are going to have testimony later on that asserts that the Japanese consumer electronics industry conducts business on a collective basis which results, therefore, in control of the industry. Would you agree with that assertion?

Senator REID. There is no question that is the case. We talk, Senator McCain, about open markets. And we in the United States, have followed that practice. As I have said, to have truly free trade it has to be fair, it has to be on both sides. What we run into with these cartels that are set up on the other side of the waters demands a "fair trade" response.

Senator MCCAIN. One of the responses of the Japanese will be, "yes, you invented a VCR, et cetera, but you failed to develop and market it. And all we did was have better manufacturing and more efficient manufacturing and marketing practices than you."

Senator REID. Well, my response to that is in some instances, of course, we have not done as we should. But when you look at the overall practices of the Japanese, it is anti-competitive. If they

want to have a truly good relationship with us as far as being trading partners, then they have to open their markets to what we do best.

And there are many things we do much better than they do, in spite of their corporate set-up. And I think that it is important that this Subcommittee, and the Commerce Committee generally, allow the American business community to work on an arrangement that is fair. I mean, what Mr. Pickens has been through is a perfect example of how we cannot compete if a person who is one of the—if not the major investor in a Japanese corporation cannot get in the door to look at the books, does not seem to me that that is a fair arrangement.

Senator MCCAIN. And a company like Go-Video who does have a concept and has the wherewithal to manufacture and market are effectively blocked by Japanese cartelization.

Senator REID. There are many examples of that.

Senator MCCAIN. Well, thank you very much. Thank you, Mr. Chairman.

Senator BRYAN. Thank you very much, Senator McCain and Senator Reid. Thank you very much. If there are no other questions of the Senator, we have been joined this morning by the ranking member of the Subcommittee, Senator Gorton, and I yield to him for any opening comments he would care to make.

OPENING STATEMENT BY SENATOR GORTON

Senator GORTON. Senator Bryan, as you well know, this hearing is on one of the central trade and competitiveness issues of our time. It is viewed by the people of the United States as being a very important subject today and I am willing to predict that it will be viewed as an even more important and vital subject next month and next year until we have reached a national consensus on the subject.

About four years ago, the Supreme Court of the United States decided a very important antitrust case called *Matsushita* v. *Zenith*. In that case American manufacturers alleged that their Japanese competitors sought to eliminate them from the market, but the Supreme Court ruled in favor of the Japanese manufacturers.

As a result, it is very difficult to prevail in a predatory pricing case, and we are here, among other things, to determine whether or not the statutes on which that decision was based are adequate.

It should be emphasized for the general public that the Supreme Court was simply interpreting antitrust statutes as they are presently written. It was not making a value judgment as to what American policy should be. That is up to us to do.

I understand, by the nature of the witnesses, that we are going to hear about wide-ranging difficulties in gaining access to foreign markets. In the case of Japan, the Administration has, of course, recently concluded what had been denominated successful strategic impediment initiative negotiations. But it certainly remains to be seen whether or not those negotiations will result in real changes. We have often hailed favorable changes from negotiating changes, but we are often disappointed in the bottom line results.

These witnesses are certainly going to help us begin to gain an understanding of the issues in this field, and I think it is important that we hear them.

Senator BRYAN. Senator Gorton, I thank you very much for your comments. As a former attorney general, you know the importance of our own antitrust laws and their limitations, at least domestically. As you point out, the *Matsushita* decision was truly an extraordinary case. As shocking as the decision was to many of us was the fact that the American government filed an amicus brief in support of the Japanese electronic firm involved, and hopefully that policy will not continue. We will have an opportunity in just a moment here to invite two of our first panelists to discuss a bit what that policy is.

First we are joined this morning, and invite him to come to the table if he will, Mr. Kevin J. Arquit, the director of the Bureau of Competition of the Federal Trade Commission. The Federal Trade Commission, as we all know, has a unique responsibility with respect to the enforcement and application of American antitrust laws. And our other witness has worked at the state level, as Senator Gorton once did as the attorney general of his own state, Mr. Lloyd Constantine, who is chief of the Antitrust Enforcement Office of the Attorney General's Office for the State of New York.

Gentlemen, welcome to the hearing this morning. We will begin, Mr. Arquit, with your testimony.

STATEMENT OF KEVIN J. ARQUIT, DIRECTOR, BUREAU OF COMPETITION, FEDERAL TRADE COMMISSION

Mr. ARQUIT. Thank you. Good morning, Chairman Bryan, Senator Gorton and Senator McCain. I will briefly summarize our written comments, which focus on problems the Bureau of Competition encounters in asserting jurisdiction and conducting discovery in international antitrust enforcement. We are very grateful for this opportunity and appreciate very much the interest you have expressed in hearing about these issues.

My comments are those of the Bureau of Competition and not necessarily those of the Commission or any individual commissioner. In this year alone, the Commission has taken enforcement action against several foreign firms and/or their U.S. subsidiaries. For example, in Nippon/Libby Owens Ford, the Commission approved a consent order prohibiting a Japanese company from limiting capacity for float glass manufacturing in the U.S. or from restricting imports to North America.

In two other matters, the Commission has authorized staff to seek a preliminary injunction to block proposed transactions. Our ability to enforce the antitrust laws generally is set forth in the Federal Trade Commission Act, which authorizes the Commission to exercise jurisdiction over unfair methods of competition in or affecting commerce.

As long as there are direct, substantial, and reasonably foreseeable effects on U.S. commerce, the Commission can exercise jurisdiction. While some foreign governments accept the effects test, they have voiced hypothetical concerns about overreaching that could result in unwarranted infringement of their national sovereignty.

U.S. courts largely agree that a domestic effects test alone does not solve the jurisdictional issue, and certain courts have expanded their analysis by examining the competing interests of foreign and U.S. governments in the conduct at issue.

The Commission and Bureau also consider the interests of other nations when undertaking investigations involving foreign actors. In addition to subject matter jurisdiction, application of the antitrust laws also depends on securing personal jurisdiction over a foreign party. The basic requirement here is that the foreign person or entity has sufficient minimum contacts with the United States so as not to offend considerations of due process.

While assertion of personal jurisdiction over a foreign respondent has not been an obstacle in every case, there have been situations where the Bureau was unable to conduct an investigation because of the difficulty of asserting jurisdiction over the potential respondents.

Conflicts have also arisen with respect to foreign discovery conducted by the United States Government. Several foreign governments have responded to American antitrust discovery by adopting blocking statutes or invoking commercial secrecy laws.

Since some foreign governments have viewed subpoenas as intrusive and an infringement of their sovereignty, voluntary cooperation is the Bureau's first means of obtaining information and evidence located abroad, including use of agreements we have with countries providing for prior consultation. Notwithstanding these efforts, our experience has not been trouble free.

Foreign discovery has caused delays and occasionally complicated investigations in adjudicative procedures. Subpoenas for testimony of foreign nationals or for documents located abroad continue, on occasion, to generate strong objections and have resulted in motions to quash.

In appropriate circumstances we have, however, successfully asserted our authority to secure testimony from foreign nationals by issuing subpoenas to the foreign corporation and serving process on their American subsidiary on an alter-ego or agency basis.

The procedures provided in Hart-Scott-Rodino provide some assistance in conducting discovery in the merger investigations covered by its provisions. In general, foreign governments perceive the HSR filing requirements as a legitimate prerequisite to any foreign firm wishing to make an acquisition affecting the U.S. market.

Because parties cannot complete their deal without submission of the appropriate material, they have strong incentives to comply with requests for information. Even with those procedures, however, the Bureau can run into difficulty obtaining the necessary information.

It is often hard to ensure that we have all the relevant information from the parties in cases where the submission appears incomplete. Where a domestic firm provides us with apparently incomplete materials, we can conduct hearings to determine the adequacy of the response. That option is often not available where the documents are located in foreign countries because of limits on our ability to conduct discovery abroad.

A more prevalent problem in the HSR context involves third-party discovery, which is often vital to assessing the merger in an

accurate competitive context. Third parties are routinely surveyed for information about market shares, ease of entry and the like. Unfortunately, our staff has little or no leverage to obtain compliance from third parties who seldom have an interest in seeing the acquisition accomplished quickly.

The time period constraints may also limit foreign discovery of third parties as a purely practical matter. Thus, we may have to resort to affidavits, which may be easier to obtain than depositions or interviews, although the latter, with the ability to have two-way communication, would be the preferred course.

That concludes my summary. I am happy to answer any questions. Thank you.

[The statement follows:]

PREPARED STATEMENT

OF

KEVIN J. ARQUIT

DIRECTOR, BUREAU OF COMPETITION

FEDERAL TRADE COMMISSION

BEFORE THE

SENATE COMMERCE, SCIENCE AND TRANSPORTATION COMMITTEE

CONSUMER SUBCOMMITTEE

JULY 19, 1990

Good morning Chairman Bryan and Subcommittee members. We appreciate very much the interest you have expressed in hearing about problems we face in asserting jurisdiction and conducting discovery in the international context. Antitrust issues with foreign overtones have grown in importance over the past several years as a result of increasing economic interdependence between the United States and the rest of the world. The number of business transactions involving foreign firms has expanded significantly, and imports and exports have become a growing factor in the American economy. Addressing antitrust concerns on an international scale has thus become an increasingly relevant aspect of the Bureau of Competition's antitrust enforcement activities. The views expressed are those of the Bureau of

Competition and not necessarily those of the Commission or any individual Commissioner.

Enforcement of the antitrust laws in an international context presents issues relating to jurisdiction and discovery that are often different from those encountered in purely domestic cases. The jurisdictional reach of United States antitrust laws can extend outside the national forum and may involve extraterritorial discovery. Thus, foreign companies or nationals commonly may be respondents or third-party sources of information in FTC investigations. My comments today will focus on problems the Bureau may encounter in asserting jurisdiction and conducting discovery in international antitrust enforcement, and will describe how we endeavor to minimize or avoid conflicts with foreign governments in conducting investigations.

Jurisdiction to Challenge Substantive Violations of Antitrust Laws

Our ability to enforce the antitrust laws generally is set forth in the Federal Trade Commission Act, which authorizes the Commission to exercise jurisdiction over "unfair methods of competition in or affecting commerce." Commerce is defined to

encompass foreign commerce, so that import and export trade, as well as domestic commerce, are covered.[1]

With respect to export trade of U.S. companies, the Foreign Trade Antitrust Improvements Act of 1982 amended Section 5 to clarify that anticompetitive conduct involving export trade must have a "direct, substantial and reasonably foreseeable" effect on United States domestic or import commerce, or on exports from the United States. In common parlance this is known as an "effects test".

Applying these standards, in this year alone, the Commission has taken enforcement action against several foreign firms and/or their U.S. subsidiaries. For example, the Commission recently authorized staff to file a preliminary injunction to block an acquisition by Bayer A.G., a Germany company, of the synthetic iron oxide business of Columbian Chemicals, Inc. In Nippon/Libbey-Owens-Ford, the Commission approved a consent order prohibiting a Japanese company from limiting capacity for float

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[1] The Commission also has enforcement responsibility for Sections 2, 3, 7 and 8 of the Clayton Act, which respectively prohibit price discrimination, tying and requirements contracts and anticompetitive acquisitions of stocks or assets, and interlocking directorates. Sections 2 and 3 of the Clayton Act confer subject matter jurisdiction over a "person engaged in commerce" (15 U.S.C. §§ 13, 14), whereas Section 7 also covers "any activity affecting commerce" (15 U.S.C. § 18), which includes foreign commerce (both imports and exports). Section 8 covers directors of corporations which have profits over a certain amount and are engaged in whole or in part in commerce (15 U.S.C. § 19).

glass manufacturing in the U.S. or from restricting imports to North America. In the acquisition of Marschall Dairy by Rhone-Poulenc, a French company, the proposed consent requires Rhone-Poulenc to license dairy cultures and to obtain Commission approval before making acquisitions of other dairy culture manufacturers.

At present, the Commission has ongoing investigations of possible antitrust violations involving foreign firms, including one requested by the House Judiciary Committee and Senate Committee on Commerce, Science and Transportation. That investigation is examining whether certain business practices, adopted in Japan by Japanese auto companies, have been adopted in the United States and, if so, whether they have had an anticompetitive effect on our domestic auto parts industry.

While some foreign governments accept the "effects" test, they have voiced hypothetical concerns about overreaching that would result in unwarranted infringement of their national sovereignty. U.S. courts largely agree that a domestic "effects" test alone does not solve the jurisdictional issue[2], and certain courts have expanded their analysis by examining the competing interests of foreign and U.S. governments in the conduct at

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[2] See, e.g. Laker Airways v. Sabena Belgian World Airlines, 731 F.2d 909 (D.C. Cir. 1984); U.S. v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).

issue.[3] The Commission and Bureau also consider the interests of other nations when undertaking investigations involving foreign actors.

In this constantly evolving area, we have not yet fully explored the full extent of subject matter jurisdiction over conduct occurring primarily in other countries. As new fact scenarios are presented in the course of investigations, we will examine those issues.

The Antitrust Division at the Department of Justice has published guidelines intended to provide businesses engaged in international operations with practical guidance concerning its internal antitrust enforcement policies and procedures.[4] These Guidelines include an explanation of factors that may affect the Department's decision to assert jurisdiction in a particular case.

In addition to subject matter jurisdiction, application of the antitrust laws also depends on securing personal jurisdiction

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[3] E.g. Timberlane Lumber Corp., v. Bank of America, 549 F.2d 597, 615 (9th Cir. 1976); Mannington Mills v. Congoleum Corp., 595 F.2d 1287, 1297-98 (3d Cir. 1979).

[4] U.S. Department of Justice, Antitrust Enforcement Guidelines for International Operations (November 10, 1988).

over a foreign party.[5] The basic requirement for asserting personal jurisdiction is that the foreign person or entity has sufficient minimum contacts with the United States so as not to offend considerations of due process. The assertion of personal jurisdiction over a foreign respondent has not been an obstacle in every case; often personal jurisdiction can be based on domestic business transactions or through an American subsidiary that acts as the foreign parent's alter ego or agent. There have been cases, however, where the Bureau was unable to conduct an investigation because of the difficulty of asserting jurisdiction over the potential respondents.

Foreign Discovery

The conflicts that have arisen because of foreign discovery conducted by the United States government or private parties are not new ones. Several foreign governments have responded to American antitrust discovery by adopting blocking statutes or invoking commercial secrecy laws. These statutes, which are either self-executing[6] or applied on an ad hoc basis at the

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[5] As the D.C. Circuit noted in Laker Airways v. Sabena Belgian World Airlines, 731 F.2d 909, 923 (D.C. Cir. 1984):

> Prescriptive jurisdiction is activated only when there is personal jurisdiction, often referred to as "jurisdiction to adjudicate."

[6] A French statute enacted July 16, 1980 automatically imposes criminal liability on any foreign national seeking discovery of economic, commercial or technical information in

(continued...)

direction of a foreign executive authority[7], bar foreign discovery by controlling or prohibiting the communication of information to foreign enforcement authorities or courts. Commercial secrecy laws prevent disclosure of various types of information constituting trade, industrial or banking secrets and impose heavy penalties to ensure compliance.[8]

In response to these statutes, and to facilitate international investigations, United States antitrust enforcement agencies have entered into voluntary bilateral and multilateral agreements with foreign countries providing for prior notification, consultation, and cooperation when taking enforcement action, including discovery, which may affect foreign interests.[9] These agreements have facilitated cooperation, and

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[6](...continued)
France in connection with pending or prospective foreign judicial or administrative proceedings, unless an exemption is provided for under international treaties or agreements.

[7] Examples are Australia's Foreign Proceedings (Excess of Jurisdiction) Act 1984, the United Kingdom's Protection of Trading Interest Act of 1980, Canada's Foreign Extraterritorial Measure Act and Section 39 of the Netherland's Economic Competition Act 1956.

[8] An example is Article 273 of the Criminal Code of Switzerland which specifically forbids, without exception, the transmission of, or an attempt to obtain, a manufacturing or business secret with a view to making it available to a foreign private or official body.

[9] Bilateral agreements have been entered into with Canada, reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,503, Australia, reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,502, and the Federal Republic of Germany, reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,501. The multilateral agreement is the Revised Recommendation
(continued...)

helped avoid conflicts over Commission discovery requests. To date, no country has invoked a blocking statute in a Commission proceeding covered by an agreement. We are exploring the possibility of expanding our sphere of cooperation by pursuing negotiations of bilateral agreements with other foreign governments.[10]

Generally

The Bureau has implemented internal procedures designed to minimize international controversy over foreign discovery requests. The Bureau takes care to ensure that international discovery seeks only information not readily available domestically. That, however, does not wholly solve the problem. As more and more parent companies of U.S. subsidiaries are located abroad, many key high-level documents and employees are located in foreign countries.

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[9](...continued)
of the (OECD) Council Concerning Co-operation between Members and Countries on Restrictive Business Practices Affecting International Trade, OECD Doc. C(86) 44 (1986).

[10] For example, the Vice-President of the Commission of the European Communities, Sir Leon Brittan, who is responsible for competition policy suggested that consideration be given to negotiating a treaty or less formal agreement between the United States and the Community aimed at avoiding conflicts of jurisdiction in competition law enforcement. Address by the Right Honorable Sir Leon Brittan to the EC Chamber of Commerce, New York, "Competition Policy in the European Community: The New Merger Regulation", March 26, 1990 at 15-16.

Since some foreign governments have viewed subpoenas as intrusive and an infringement of their sovereignty, voluntary cooperation is the Bureau's first means of obtaining information and evidence located abroad. Wherever possible, the Bureau uses the bilateral and multilateral agreements mentioned above. Within the Bureau of Competition, the International Division, which is responsible for coordinating international matters, consults with the State Department and notifies the foreign government before foreign discovery is sought within its territory. The Commission has also taken steps to ensure that its adjudicative procedures provide for proper notice of foreign discovery requests.

Notwithstanding the various mechanisms at the Bureau's disposal, our experience has not been trouble-free. Foreign discovery has caused delays and occasionally complicated investigations and adjudicative procedures. In an ongoing administrative proceeding, the parties alleged that the British government would threaten a blocking action in response to a subpoena issued to a United Kingdom firm if the staff pressed for enforcement of the subpoena. Staff initially attempted to seek foreign discovery on a voluntary basis but when this route proved unsuccessful, the Commission issued a subpoena that the foreign firm resisted. Ultimately, the foreign firm agreed to voluntary production and the British blocking statute was not invoked, but

only after considerable time and resources had been spent in resolving the issue.

Subpoenas for testimony of foreign nationals or for documents located abroad continue, on occasion, to generate strong objections, and have resulted in motions to quash. Such motions have contested the Commission's exercise of personal jurisdiction and method of service of process. To date, the Commission has successfully asserted its authority to secure testimony from foreign nationals by issuing subpoenas to the foreign corporation and serving process on the foreign firm's American subsidiary under an agency or alter ego theory. These disputes, however, are often time-consuming and highlight the Commission's difficulty in effecting extraterritorial service directly on foreign firms and foreign nationals.

As to subpoenas calling for documents located abroad, a motion to quash was filed recently based principally on the ground that the subpoena would violate Swiss penal law on commercial secrecy. In that situation, the motion was denied as being untimely filed. Production, however, was limited initially to documents located in the United States, which proved sufficient for the staff's purposes. That option, however, may not always be available or satisfactory. Thus, the issue of the appropriate procedure for obtaining foreign discovery in nations that have enacted commercial secrecy laws remains an open one.

In another case, it was necessary for the Commission to address difficult issues regarding who must translate foreign language documents submitted pursuant to an FTC subpoena, and who must bear the often high costs. On the facts of that case, the Commission concluded that the Commission had the obligation to translate the documents. As our work involving foreign actors expands, we anticipate that these questions will recur in various settings and may delay discovery in some investigations.[11]

Hart-Scott-Rodino Investigations

The procedures provided pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976 provide some assistance in conducting discovery in the merger and acquisition investigations covered by its provisions. In that Act, Congress required parties to acquisitions exceeding specified thresholds to give the Commission advance notice of the transaction and wait a specified period thereafter before proceeding with the merger.[12] The Commission is authorized in appropriate cases to extend the statutory waiting period while seeking additional information from the parties. In general, foreign governments perceive the HSR filing requirements as a legitimate prerequisite to any

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[11] Parties are, however, required to submit translated documents when responding to Requests for Additional Information issued under the HSR Act.

[12] 15 U.S.C. § 18(a), 16 C.F.R. §§ 801-03 (1984).

foreign firm wishing to make an acquisition affecting the U.S. market. Because parties cannot complete their deal without submission of the appropriate material, they have strong incentives to comply with requests for information.

Even with the HSR procedures, however, the Bureau can run into difficulty obtaining the necessary information. There often may be major hurdles that make it hard to insure that we have all the relevant material from the parties in those cases where the submission appears deficient or incomplete. Where a domestic firm provides us with apparently incomplete materials, the staff often conducts a series of investigational hearings to determine whether the document response has been adequate. That option is often not available where the documents are located in foreign countries, because of limits on our ability to conduct discovery abroad.[13] Even where we attempt to take discovery from the parties' employees, we may be faced with motions to quash, which both cause delay and tie up resources on matters tangent to the actual substantive investigation.

A more prevalent problem in HSR investigations is likely to concern third-party discovery, which is often vital to assessing the merger in an accurate competitive context. Third parties are

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[13] Section 7A(g)(2) (15 U.S.C. § 18a) authorizes the Commission to take action against parties that have not complied with the reporting requirements of the HSR Act. However, as with the substantive response, it is difficult to prove a negative: that relevant documents were omitted from the submission.

routinely surveyed for information about market shares, ease of entry and the like. Unfortunately our staff has little or no leverage to obtain compliance from third parties, who seldom have an interest in seeing the acquisition accomplished quickly. That may pose a particular problem in the HSR context. Foreign competitors may view as overly intrusive discovery requests for sales and production information, including future plans; such data is often needed in merger investigations to define the relevant market in which to predict competitive effects. Where the foreign third parties will not comply voluntarily the Commission must resort to subpoena enforcement proceedings in federal district court which can take months before an order issues. Staff may, therefore, be unable to obtain necessary foreign third-party discovery within the HSR time constraints.

The time period constraints may also limit foreign discovery as a purely practical matter. At times, staff would like to seek information from third-party foreign companies, but are virtually certain that they will not obtain it within the necessary time. Or, they may seek to obtain affidavits, which may be easier to obtain than depositions or interviews, although the latter, with the ability to have two way communication, may be the preferred course.

International antitrust enforcement raises unique and difficult problems for the Bureau in the exercise of its

statutory jurisdiction and investigative powers. As markets become more international, new issues are likely to arise. Over the last several years, the Bureau has made substantial efforts to adopt mechanisms and procedures to minimize or avoid the conflicts and controversies that have occurred in the past. There still remain obstacles to our ability optimally to enforce the antitrust laws in an international context. We will continue to study and explore these issues with a view to developing practical solutions.

Thank you. I am happy to answer any questions.

Senator BRYAN. We thank you very much, Mr. Arquit. We will next hear from Mr. Constantine.

STATEMENT OF LLOYD CONSTANTINE, ASSISTANT ATTORNEY GENERAL IN CHARGE, ANTITRUST BUREAU, STATE OF NEW YORK

Mr. CONSTANTINE. Senators, thank you for the opportunity to testify today. Today I am testifying only for myself.

The idea that antitrust enforcement is a substantial cause of the difficulties that the United States has experienced in world markets is without merit. I thought that idea was killed in 1982 when William Baxter, President Reagan's first antitrust chief, told the Judiciary Committee that instead of granting antitrust immunity to distressed industries, it could grant them a license to import heroin. He observed that neither would increase competitiveness but that the latter would at least increase profitability.

In 1986 the Administration offered antitrust immunity to distressed industries in exchange for surrendering other forms of relief such as duties and tariffs. This proposal was accorded deafening silence by American industry and was quickly withdrawn.

The decade-long scapegoating of antitrust was innocuous as long as everyone recognized that the legislative proposals had no possibility of enactment.

However, when these ideas were carried into action, serious harm was done. During the LTV-Republic Steel merger, the Commerce Department overruled the Justice Department's intention to challenge that transaction on competitive grounds. Commerce argued that the combined resources of Republic and LTV were necessary to compete effectively against foreign steel companies.

The merger was followed by a Chapter 11 filing by the formerly healthy LTV, and one of the most efficient stainless steel plants in the United States, the Enduro facility in Massillon, Ohio quickly went under. It is now time to put that 1980's debate behind us and move forward to a serious discussion of the relationship between

antitrust and competitiveness and, I should say, it is not the whole answer. It is part of the answer.

While strong antitrust enforcement has not harmed us, weak enforcement and gaps in the law's coverage of foreign companies has certainly contributed to some of our difficulties. I will illustrate how this has occurred in three cases.

As you referred to, Senator, on November 12th, 1985, Federal enforcement of the antitrust laws and government advocacy for American industry both reached their low point. On that day the Assistant Attorney General in Charge of the Antitrust Division argued before the United States Supreme Court in the case of *Zenith* v. *Matsushita* which pitted the American consumer electronics industry against a Japanese cartel.

The Americans alleged that the Japanese industry, with help from the Japanese government, had for several decades engaged in a conspiracy to destroy the American industry through predatory pricing and dumping. The complaint was filed in 1974, and I guess in 1974 somebody might have questioned the motive and ability of the Japanese to pull off such a grandiose scheme in an area of traditional American dominance. But by 1985 it was truly astounding that the U.S. would argue that *Matsushita* should win because the Japanese industry had no economically plausible means to recover profits lost during decades of predatory pricing.

The United States also argued that evidence in the court record of a conspiracy should either be excluded or dismissed as equally consistent with a pro-competitive rationale. But as Justice Frankfurter once observed, "history also has its judgment."

The court records showed a system of fixed prices for goods exported to the U.S. arranged by the Japanese Ministry of International Trade and Industry, MITI, an agreement to allocate American distributors according to the so-called "five company" rule, and a domestic price fixing plan in Japan which helped recoup profits lost through predatory sales in the United States. By a margin of 5 to 4 the Supreme Court adopted the United States position supporting *Matsushita*.

And the rest is history. As is the American consumer electronics industry.

In 1989 a consultant to the Japanese industry in this litigation told me personally that although the Japanese FTC had been preparing a case charging the domestic television manufacturers with price fixing in Japan, the case was killed because it supported the position of the United States industry in the still pending *Matsushita* litigation.

The U.S. Government's position in *Matsushita* helped enshrine a flawed approach to analyzing market behavior. This flaw must now be addressed by the Congress. In *Matsushita* the United States Government said that American antitrust law is devoid of political or social content. It said that antitrust is nothing more than the economic theories which are favored by the Administration.

But most eloquently, the U.S. Government said that there was a calling higher than to the rule of law, or respect for facts, or allegiance to American industry. The Japanese government through its FTC and MITI, obviously saw its responsibilities differently.

My second example involves the area of vertical trade restraints, which are restraints upon the distribution of goods and services. These include vertical price fixing and non-price vertical restraints such as exclusive geographical territories. The proliferation of vertical trade restraints threatens one area of clear American commercial superiority.

Our distribution system is a wonder of the world, as we speedily get products to market in an endless variety of methods. Vertical price fixing eliminates price competition. Non-price restraints also seek to restrain price rivalry and channel the flow of products along predetermined paths rather than allowing market forces to work.

Our office has conducted scores of resale price maintenance investigations, and we have done them with the Attorney General in Washington and with the Attorney General in Nevada and other offices. We have helped obtain numerous felony convictions and recovered tens of millions of dollars in restitution. Vertical price fixing, or RPM, is, once again endemic in the American marketplace, despite the 1975 repeal of the fair trade laws.

For every case we have brought, we have had to let go of ten, because of the increasingly unrealistic legal standards for proving our cases. The Committee may be aware of the 1986 *Minolta* case involving 37 state attorneys general and the 1989 *Panasonic* case, a brand name of *Matsushita*, which involved 49 state attorneys general and the District of Columbia. In these two cases more than 20 million dollars were made available to consumers as restitution for alleged vertical price fixing. More cases will follow.

To me these cases disclose the coerced imposition of an inefficient and foreign system of restricted distribution over a highly efficient American retailing sector. These cases also represent a way for the Japanese industry to recover some of the profits lost in the conspiracy alleged in *Matsushita*. I abhor the senseless bashing of our Japanese trading partners. However, as a law enforcer, I also face reality, such as a document uncovered in a recent investigation. An officer of a Japanese conglomerate, while discussing plans to fix and stabilize prices in the United States observed, "Not only electronics companies but even automobile companies will follow us. In other words, they have an extremely positive view of our new sales program and wish us a big success. This confirms that what we are doing is right and will be appreciated by the society."

Whether or not such interdependent behavior crossing company and industry lines strikes a Western economist as rational behavior, it is happening, and one defense against it is strong antitrust enforcement. It is not the whole answer.

Weak antitrust leaves U.S. industry susceptible to predation from foreign commercial entities. Loose legal standards for the exercise of antitrust jurisdiction over foreign entities exacerbate this problem.

My final example arises from the insurance antitrust litigation now pending in the Ninth Circuit. The insurance litigation involving 19 state attorneys general is the biggest and most important civil case now pending in the United States.

The states allege that as a result of a conspiracy among U.S. insurers and foreign reinsurers, primarily Lloyd's of London syndi-

cates, the cost of commercial general liability insurance has increased several fold while the scope of coverage has decreased significantly. CGL coverage is the basic insurance needed by nearly every business in the United States. The mounting cost of CGL insurance has significantly raised the cost of U.S. companies and rendered them less able to compete with foreign entities.

In October 1989 the District Court dismissed the state's case against the U.S. defendants relying primarily upon the McCarren-Ferguson antitrust exemption, which is a matter for another day, but the Court also dismissed the claims against the foreign insurers, citing principles of international comity. The Court decided that it had subject matter jurisdiction over the foreign insurers because their conduct had a direct and substantial affect on commerce in the United States, but declined to exercise jurisdiction because, "English courts have repeatedly expressed unmitigated hostility to the extra-territorial application of American antitrust laws."

The District Court's solicitude for the English hostility to American antitrust law is unfounded and unwelcome when American industry is being targeted by an English cartel. The Court's comity ruling is an exercise of foreign policy which should be reserved exclusively to the executive branch of our government.

The antitrust precedents of the European Economic Community and its member states are dominated by cases applying their law to our companies. The new EEC merger regulation, which will go into effect this fall, will almost exclusively reach mergers involving American companies. Japan's FTC is also exploring new ways to apply its antitrust principles to foreign companies. I would expect those foreign companies would be our companies.

The foregoing are examples of how weak antitrust enforcement and weak substantive and jurisdictional standards hurt our competitiveness, our consumers and the American economy. I have several legislative proposals to suggest which deal with these issues.

There are three antitrust bills pending in Congress this year which should be packaged and enacted as a single measure. These are the Joint Production Bill, the Freedom From Vertical Price Fixing Act, S-865, and the revision of Clayton Act Section 8 dealing with interlocking directorates. The price fixing bill which recently passed the House enjoys the vigorous support of 49 state attorneys general and is absolutely essential to restore sensible legal standards to the area of vertical trade restraints. Without this legislation, our economy will continue to have foreign-based companies impose their own inefficient and anti-consumer distribution concepts on our otherwise highly efficient retail sector.

Congress should address the *Matsushita* case and its flawed rationale. When there is overwhelming evidence that foreign or domestic companies collude with the intent to destroy their competitors, the antitrust laws should provide a remedy. The inability to demonstrate the manner in which lost profits can be quickly recouped should hardly be relevant. Many companies, especially those from abroad, understand the long-term view of commercial matters instead of quick recoupment schemes. They also understand how the dominance of an industry, whether or not particu-

larly profitable in the short term, may contribute to dominance in adjacent industries, adjacent technologies and markets.

Extra-territorial application of the American antitrust laws will be the norm rather than the rare exception in the near future. Our free trade agreement with Canada, the prospect of a similar pact with Mexico and our Latin neighbors and developments within the EEC, Japan, and Eastern Europe will all accelerate the trend towards continental and global markets. A modest step would be to enact a law which grants the executive branch the exclusive power to decide whether foreign policy and comity require a court to defer the exercise of existing subject matter antitrust jurisdiction over foreign entities.

Strong antitrust enforcement requires adequate staffing levels. Last year the ABA issued two special reports dealing with the FTC and Antitrust Division. I was a member of the Antitrust Division Task Force. Both panels recommended significantly increased funding levels for these agencies, which are roughly half their 1980 size. They have strong, new leadership, including my colleague, Mr. Arquit. They have the leadership, but they do not have the resources. And I know that money is scarce, but each additional government antitrust staffer returns his or her salary many times over in civil and criminal monetary recoveries. More importantly, they secure other forms of relief for society which are not as easily quantifiable but still represent the core mission of antitrust enforcement.

Thank you, Senators. I have also included in my written testimony a serious proposal for antitrust immunity in a high tech industry, but I have taken too much of your time. Thank you very much.

[The statement follows:]

STATEMENT OF LLOYD CONSTANTINE, ASSISTANT ATTORNEY GENERAL IN CHARGE, ANTITRUST BUREAU, NEW YORK STATE

Senator Bryan and members of the Committee. Thank you for this opportunity to testify concerning the relevance of antitrust law enforcement to the competitive position of United States' industries in the increasingly globalized marketplace.

In the last few years I have served as the Chief Antitrust enforcer of New York State, the Chairman of the 50 State Antitrust Task Force of the National Association of Attorneys General, NAAG's representative to the American Bar Association Section of Antitrust Law, and as Chairman of the Antitrust Law Section of the New York State Bar Association. Today, however, I testify only for myself.

The idea that antitrust enforcement is a substantial cause of the difficulties that the United States has experienced in world markets is without merit. This assertion, often emanating from the Commerce Department, has no serious adherents among antitrust law enforcers, scholars or private practitioners, but is celebrating a dubious tenth anniversary. In 1980 the Senate passed a bill which would have created a cabinet level commission to study whether the antitrust laws were hurting the United States in international markets.[1] The bill died but the idea did not. In 1982, William Baxter, President Reagan's first Antitrust Chief, derisively told Congress that instead of granting antitrust immunity to distressed industries it could grant them a license to import heroin. Neither would increase competitiveness but the

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[1] Senate Passes Bill Setting Up Commission to Study Impact of International Enforcement, (July-Dec.) Antitrust & Trade Reg. Rep. (BNA) No. 983, at A-4 (Oct. 2, 1980)

latter would at least increase profitability.[2]

In 1984 the Reagan Justice Department again opposed antitrust immunity for distressed industries but supported the National Cooperative Research Act, which partially immunized joint research and development ventures, a modest measure which changed the antitrust treatment of joint research ventures as inconsequentially as the currently proposed joint production bill would change the antitrust treatment of joint production ventures.

In 1986 the Administration offered antitrust immunity to distressed industries in exchange for surrendering other forms of relief afforded by the Trade Act of 1974, such as duties, tariff rate quotas, quantitative import restrictions, and "orderly" marketing agreements. The so-called "Promoting Competition In Distressed Industries Act" was accorded deafening silence by American Industry and was quickly withdrawn from the Reagan Antitrust reform package. The decade long scapegoating of antitrust was innocuous as long as everyone recognized that the legislative proposals were trivial pursuits or had no possibility of enactment. However, when these ideas were carried into action serious harm was done. During the infamous LTV-Republic Steel merger, the Commerce Department got the upper hand and overruled the Justice Department's intention to challenge that transaction on competitive grounds. Arguing that the combined resources of

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[2] Baxter testified to this effect before the Congressional Oversight Committee in 1982. Conversation with Bill Baxter (July 6, 1989) (testimony confirmed).

Republic and LTV's Jones and Loughlin were necessary to compete effectively against foreign steel companies (all of which were smaller than either of the merging parties) the merger proceeded and was soon followed by the Chapter 11 bankruptcy filing of the formerly healthy LTV and the closing of one of the most modern and efficient stainless steel plants in the United States, the Enduro facility in Massilon Ohio.[3]

My recommendation to this Committee for putting the 1980's debate behind us and moving forward to a serious discussion of the relationship between antitrust and competitiveness is two-fold. First, enact the joint production bill. This will not be a significant change, but opposition to it is a needless waste of time. Second, ask Special Trade Representative Carla Hills to testify before this Committee. She is a distinguished antitrust lawyer. Ask her for her personal opinion (not the Administration's) of whether vigorous antitrust enforcement has played any role in our present competitive predicament.

While strong antitrust enforcement has not harmed us, weak enforcement and gaps in the law's coverage of foreign companies has certainly contributed to some of our difficulties. I will illustrate how this has occurred in three cases. I will also make recommendations for dealing with these problems and make one

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[3] Oversight Hearing on Mergers: Hearing on Effective Antitrust Enforcement Before the Subcomm. on Antitrust Monopolies, and Business Rights of the Senate Comm. on the Judiciary, 100th Cong., 1st Sess. 88 (1987) (statement of Anthony Celebrezze, Attorney General of Ohio).

proposal for a serious experiment with antitrust immunity.

On November 12, 1985 federal enforcement of the antitrust laws and government advocacy for American industry both reached their low point. On that day the Assistant Attorney General in Charge of the Antitrust Division argued before the United States Supreme Court in the case of Zenith v. Matsushita,[4] which pitted the American consumer electronics industry against a Japanese cartel. The Americans alleged that the Japanese industry, with the connivance of the Japanese government had, for several decades, engaged in a conspiracy to destroy the American industry through predatory pricing and dumping. The conspiracy allegedly began in the early 1950's. By the time the complaint was filed in 1974, there might still have been some doubt about the motive, method, and ability of Japanese industry to pull off such a grandiose scheme in an area of American dominance. But by November 12, 1985, with the American industry substantially destroyed, it was truly astounding for the United States to argue that Matsushita and its alleged co-conspirators should win because the conspiracy with which they were charged was not economically rational. The U.S. argued that because the Japanese industry had no economically plausible means to recover profits lost during decades of predatory pricing, that the defendants had never conspired. The U.S. also argued that evidence in the Court record of a conspiracy should either be excluded or dismissed as equally consistent with a pro-

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[4] Matsushita Electronic Industries Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

competitive rationale. But as Justice Frankfurter once observed "history also has its judgment". The record evidence disregarded by the United States included (1) a system of fixed prices for goods exported to the U.S. arranged by the Japanese Ministry of International Trade and Industry, ("MITI"), (2) an agreement to allocate American distributors according to the so-called "Five Company Rule", (3) a domestic price-fixing plan raising prices in Japan. This plan both depressed domestic consumption, releasing goods for export, and helped recoup profits lost through predatory sales in the United States. By a margin of 5 to 4 the Supreme Court adopted the United States' position supporting Matsushita and reversed the Court of Appeals decision in favor of Zenith. The rest is history, as is the American consumer electronics industry, at least for the current generation of products.

In 1989 a consultant to the Japanese industry in this litigation told me that although the Japanese Fair Trade Commission ("FTC") had been preparing a case charging the domestic television manufacturers with price-fixing in Japan, the case was killed because it tended to support the position of the U.S. industry in the still pending Matsushita litigation.[5]

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[5] The Japanese FTC apparently established a case against the Japanese television manufacturers but "killed" it, in part, because it would have supported Zenith's position in the Matsushita litigation. Conversation between Lloyd Constantine and Mitsuo Matsushita, Prof. of Law at Univ. of Tokyo (May 23, 1989). (Prof. Matsushita was a consultant for the Japanese defendants in the Matsushita case).

The U.S. government's position in Matsushita evidenced a major misinterpretation of the antitrust laws and misguided advocacy on behalf of foreign competitors and governmental institutions at the expense of American industry. It also enshrined in case law a flawed approach to analyzing market behavior. This flaw must now be addressed by the Congress. In Matsushita, the U.S. government said that American antitrust law is devoid of political or social content. It said that antitrust is nothing more than economics, and then only the economic theories which are in favor in the incumbent Administration. It said that when facts conflicted with such favored economic theories such factual evidence must give way. But most eloquently the U.S. government said that there was a calling higher than to the rule of law, or respect for facts or allegiance to American industry. The Administration was called to honor the teachings of the economists the Administration happened to agree with. The Japanese government through its FTC and its MITI obviously saw its responsibilities differently.

My second example involves the area of vertical trade restraints, which are restraints upon the distribution of goods and services. These include vertical price fixing, which is per se unlawful and has been prosecuted as a felony by both state and federal authorities, and non-price vertical restraints such as exclusive geographical territories for distributing merchandise. The proposed Malt Beverage bill, defeated in each of the last eight years would grant antitrust immunity to such restrictions on the distribution of beer.

The proliferation of vertical trade restraints threatens one area of clear American commercial superiority. Our distribution system is a wonder of the world, as we speedily get products to market in an endless variety of methods. Consumers benefit from vigorous competition on price and service spawned by the myriad retail and wholesale outlets which sell a particular brand of merchandise. Vertical price-fixing eliminates price competition. Non-price restraints also seek to restrain price rivalry and channel the flow of products along predetermined paths, rather than allowing market forces to determine how and at what price merchandise will reach the consumer.

My office has conducted scores of resale price maintenance investigations, obtained numerous felony convictions and recovered tens of millions of dollars in fines, penalties and consumer restitution. This is because vertical price fixing has once again become endemic in the American marketplace, despite the 1975 repeal of the Fair Trade Laws.[6] For every case we brought, we have had to let go of ten because of the increasingly unrealistic legal standards for proving such cases. The bulk of these matters have concerned consumer electronics and related industries which are dominated by foreign industry. The Committee is no doubt aware of

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[6] The enactment of the Consumer Goods Pricing Act, Pub. L. No. 94-145, 89 Stat. 801 (1975), repealed the fair trade laws. The Senate Report accompanying the act indicated that consumers would save $1.2 billion a year by eliminating these laws. (Senate Committee on the Judiciary S. Rep. No. 280, 100th Cong., 2d Sess. (1988), reprinted in 54 Antitrust & Trade Reg. Rep. (BNA) No. 1351, at 210 (Feb. 4, 1988).

the 1986 Minolta case[7] involving 37 State Attorneys General and the 1989 Panasonic case,[8] a brand name of Matsushita Electric Corporation of America, which involved 49 State Attorneys General and the District of Columbia. In the next several months you will see the next chapter in this series of connected events. To me these cases disclose the coerced superimposition of an inefficient and foreign system of restricted distribution over a highly efficient American retailing sector. These cases also represent a way for the Japanese industry to recover some of the profits lost in the conspiracy alleged in the Matsushita case. Can American retailers turn to American products distributed without such price and non-price restrictions? Unfortunately, in most cases there is presently no American alternative. I abhor the senseless bashing of our Japanese trading partners. It is a tasteless and counterproductive enterprise. However, as a law enforcer, I also face reality. One such piece of documentary reality was uncovered in a recent investigation. An officer of a Japanese conglomerate while discussing plans to fix and stabilize prices in the United States observed "not only electronics companies but even automobile companies will follow us. In other words they have an extremely positive view of our new Sales Program and wish us a big success. This confirms that what we are doing is right and will be

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[7] In re Minolta Camera Products Antitrust Litigation, 668 F.Supp. 456 (D.Md. 1987).

[8] In re Panasonic Consumer Electronics Products Antitrust Litigation, No. 89 Civ. 0368, (S.D.N.Y. Jan. 18, 1989).

appreciated by the society." Whether or not such interdependent behavior crossing company and industry lines strikes a Western economist as economically rational behavior, it is happening. One defense against it is strong antitrust enforcement. The FTC's current investigation into the "Keiretsu" system will provide further insights into this phenomenon.

Weak substantive antitrust standards leave U.S. industries susceptible to predation from foreign commercial entities. Loose legal standards for the exercise of antitrust jurisdiction over foreign entities greatly exacerbate this problem. My third and final example arises from the Insurance Antitrust Litigation[9] now pending in the Court of Appeals for the Ninth Circuit. I believe this case demonstrates the need for legislation to specify how a decision to exercise or decline jurisdiction over foreign entities will be made when principles of international comity apply.

The insurance litigation being prosecuted by nineteen State Attorneys General is the biggest and most important civil case now pending in the United States. The States allege that as a result of a conspiracy among U.S. insurers and foreign reinsurers, primarily Lloyd's of London syndicates, the cost of Commercial General Liability Insurance ("CGL") has increased several fold while the scope of coverage has decreased significantly. CGL coverage is the basic insurance needed by nearly every business in the United States and by most schools, day care centers and not-

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[9] In re Insurance Antitrust Litigation, 723 F.Supp. 464 (N.D. Cal. 1989).

for-profit organizations. The mounting cost of CGL insurance has raised the costs of U.S. companies and rendered them less able to compete with foreign entities which bear significantly lower insurance costs. The States do not believe that the alleged conspiracy is the whole answer to high insurance premiums, but that it is a significant part of the problem.

In October 1989, the District Court dismissed the States case against the United States defendants, relying principally upon the McCarran-Ferguson Antitrust exemption. McCarran-Ferguson repeal is an issue for another day. The Court also dismissed the claims against the foreign insurers citing principles of international comity. The Court acknowledged that both case law and the Foreign Trade Antitrust Improvements Act conferred subject matter jurisdiction over foreign entities in this case, where the defendants conduct had a "direct, substantial and reasonably foreseeable effect" on commerce within the United States. Nevertheless, the Court declined to exercise jurisdiction because this would "conflict with English Law and policy" and "English courts have repeatedly expressed unmitigated hostility to the extraterritorial application of American antitrust laws."[10]

I have annexed to my testimony a document signed by 40 English reinsurers wherein they agree to boycott any insurance or reinsurance in the United States or Canada unless coverage for certain environmental claims are excluded from the underlying

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[10] 723 F.Supp. at 488.

insurance policies.

The District Court's solicitude for the English hostility to American antitrust law is unfounded when American industry is being targeted by an English cartel. The Court's comity ruling is an exercise of foreign policy which should be reserved to the Executive Branch of our government. I am most happy and grateful that the Solicitor General, at the urging of Assistant Attorney James Rill and FTC Chairman Janet Steiger, has filed a brief amicus curiae in support of the States appeal in the Ninth Circuit.

Any scholar of international antitrust knows that the antitrust precedents of the European Economic Community and its member states are dominated by cases applying their laws to our companies. The new EEC merger regulation, which will go into effect this fall, will almost exclusively reach mergers involving American companies. This is because of the high annual numerical thresholds necessary to trigger the regulation's operation. Japan's FTC is also exploring new ways to apply its antitrust principles to foreign companies. I wonder who they have in mind?

The foregoing are merely three examples of how weak antitrust enforcement and weak substantive and jurisdictional standards hurt our competitiveness, our consumers and the American economy. The legislative proposals suggested to remedy these problems are as follows:

1. There are three antitrust bills pending in Congress this year which should be packaged and enacted as a single measure. These are the joint production bill, the "Freedom From Vertical

Price-Fixing Act" (S. 865) and the revision of Clayton Act Section 8 dealing with interlocking directorates. The packaging will create a balance in which the opposition for each is constrained by the support for another bill in the package. Each bill merits passage. The Price-Fixing Act, which recently passed by the House as HR. 1236, enjoys the vigorous support of 49 State Attorneys General and is absolutely essential to restore sensible legal standards to the area of vertical trade restraints. Without this legislation our economy will continue to have foreign based companies impose their own inefficient and anti-consumer distribution concepts on our otherwise highly efficient retail sector.

2. Congress should address the Matsushita case and its flawed rationale. When there is overwhelming evidence that foreign or domestic companies collude with the intent to destroy their competitors (in Matsushita they succeeded) the antitrust laws should provide a remedy. The inability to obtain expert testimony on the manner in which profits lost during the predatory scheme can be quickly recouped should hardly be relevant. Many companies, especially those based abroad, understand the long term view of commercial matters instead of quick recoupment schemes. They also understand how the dominance of an industry, whether or not particularly profitable in the short term, may contribute to dominance in adjacent industries, technologies and markets. The United States had better learn the full dimensions of competition and competitiveness. The problem I am addressing extends well

beyond the Matsushita decision and has now infected the fabric of the law. With the Committee's permission I will submit specific legislative proposals to deal with these issues in the near future.

3. The issue of extraterritorial application of the American antitrust laws will be the norm rather than the rare exception in the near future.

Our Free Trade Agreement with Canada, the prospect of a similar pact with Mexico and our Latin neighbors, developments within the EEC, Japan and Eastern Europe will all accelerate the trend towards continental and global markets for certain goods and services. A modest step would be to enact a law which grants the Executive Branch the power to decide whether foreign policy and comity concerns require a Court to defer the exercise of existing subject matter antitrust jurisdiction over foreign entities.

The Reagan Administration's Foreign Trade Antitrust Improvements Act of 1986, which was never enacted, would achieve this result.

4. Strong antitrust enforcement requires adequate staffing levels. Last year the American Bar Association issued two special reports dealing with the FTC and the Antitrust Division. I was privileged to be a member of the Department of Justice Special Task Force. Both panels recommended significantly increased funding levels for our antitrust and consumer protection agencies. These agencies are roughly half their 1980 size. They have strong new leadership but they need additional resources. I know that money is scarce in Washington and it is even more so in the States. I

also know that each additional government antitrust staffer returns his or her salary many times over in civil and criminal monetary recoveries. More importantly they secure other forms of relief to society which are not as easily quantifiable but represent the core mission of antitrust enforcement.

I have one final proposal for a non-trivial experiment with antitrust immunity. All proposals to date, whether they be immunity for joint research and development or production, are subject to the criticism, whether or not valid, that they don't go far enough. I propose that the Congress carefully select a high technology industry of the future, whether it be High Definition Television, superconductivity, high temperature fusion, levitating trains or what have you. Congress should grant the U.S. owned and based companies full antitrust immunity to jointly research, develop, produce and market the technology for a defined term. I would also propose government investment in this enterprise to avoid the argument that the venture failed for want of government funding. Once and for all we can study how this all works. My belief is that it will not work. Our strength is in competition and we will probably fail if we forget how we achieved dominance and try to emulate another nation's successful model. But it is correct to carefully select, try it once and be open to learn from the experience.

Senator BRYAN. Mr. Constantine, we thank you for your testimony.

Let me begin by asking you a couple of broadly based questions.

As an antitrust lawyer, is it your view that practices that may be devised and executed in a foreign country which directly impact the American marketplace and which would, if performed in the United States by American companies, violate antitrust laws, would be illegal?

Mr. CONSTANTINE. Certainly. Even if they are performed abroad. Annexed to my written testimony, is a document executed in London and signed by 40 London reinsurers at the Lloyds of London syndicate. There is no doubt that our law reaches those types of activities, if there is a direct and substantial and foreseeable effect on American commerce.

In the case that I cited, the court found there was subject matter jurisdiction, but because of English hostility, because of a foreign policy concern, the Court decided to decline the exercise of jurisdiction which it had.

Now, I think that may be appropriate in some cases, but it is not an appropriate exercise for a court, for a District Court to make. It is the appropriate exercise of the executive branch of the United States Government to make in its overall exercise of foreign policy in the United States.

So our laws, in terms of jurisdiction, are adequate to reach these cases, unless we have loose standards for when courts will defer jurisdiction.

Senator BRYAN. So in other words, the existing scope and reach of our antitrust laws is broad enough to embrace and give a jurisdictional predicate for action against such activity to be taken in the American legal system?

Mr. CONSTANTINE. Jurisdiction is there, Senator, but the substantive standards of the law, which were not always as weak as they are now, have become so weak that the substantive standards are incapable now of dealing with the kind of activity that was engaged in *Matsushita.*

That case cannot be brought again unless the Congress steps in and takes action.

Senator BRYAN. Can you suggest specifically what particular aspect of that court's holding ought to be addressed by the Congress? Can you be a bit more specific?

Mr. CONSTANTINE. Certainly, Senator. What was going on in Matsushita, and what has gone on in cases since *Matsushita* is as follows: It used to be sufficient if you found evidence of a clear intent to destroy your competitors. That was a violation of the antitrust laws. As long as that was done collectively, it violated section 1 of the Sherman Act.

Senator BRYAN. In your view that is a correct policy?

Mr. CONSTANTINE. That is a correct policy. Or if it was done by one company with monopoly power, then it might violate section 2 of the Sherman Act and the analogous provision of the FTC Act, section 5.

Now enshrined in our law is a different principle, which is that it does not matter that somebody tried to destroy you, that they had clear intent to destroy you. The question is, do they have the

ability in the future to recover the profits lost during the period of predation?

And that is a very narrow kind of inquiry. The question is in the next five years or ten years, do they have a plausible plan to get this money back?

That is not what the law should look at. The law should look at reality. When competitors or individual companies seek to destroy their rivals and they succeed, there should be a remedy for that.

What happened in *Matsushita* led to a situation where our industry was destroyed. The Japanese industry became dominant in the world and that has secondary affects in other industries, in adjacent markets, and in adjacent technologies. I believe that is what the antitrust laws are there for. That is what they were there for until the recent unpleasantness of the 1980's where our antitrust laws became a very small equation about economics and about a certain school of economics, not a broad view of economics, not a long-term view. And not anything to do with social or political policy.

Antitrust was the finest expression of American populism in the last century. It was a big policy. It had to do with social policy and political policy. It had a vision of America. It was the charter of our market economy. It was the Bill of Rights, the Magna Carta. Now antitrust can be explained on a blackboard as having to do with a little triangle, and I can do it for you in five seconds and that is all it is. That is what the courts have reduced it to. And it is time now, 100 years after the enactment of the Sherman Act, to relook at the reasons why that act was passed in the first place and for Congress to redirect antitrust policy in the United States.

Senator BRYAN. Mr. Constantine, you are recommending that statutory language be changed to specifically overrule the Japanese case that you have described to us. Are you making any other specific recommendations with respect to legislation that ought to deal with the antitrust implications of foreign competition which involves inherently unfair monopolistic or anti-competitive practices?

Mr. CONSTANTINE. I think the antitrust law is there to protect American consumers and American business against collusion and predation, whether it occurs because of American companies or foreign companies. I do not think we should ever enact a law which targets foreign trading partners. I think that we should be on a level playing field. And if predatory practices are engaged in by American companies or foreign companies or trading partners in Europe, they should all be treated equally.

What I am saying is that the substantive standards of the law now do not reach the kind of activity which is prevalent among our trading partners.

Senator BRYAN. Mr. Constantine, to be narrowly focused here, the only change you are recommending to us is specifically changing the standard that you alluded to in the particular case?

Mr. CONSTANTINE. Yes, but it is quite a significant change.

Senator BRYAN. I understand. Have you submitted any draft of that language?

Mr. CONSTANTINE. I will submit within one week a draft of legislation which would deal with that, and also I have made recommendations on the Freedom From Vertical Price Fixing Act, the

other two bills in the package, and the issue of foreign jurisdiction, when courts will exercise subject matter jurisdiction over foreign entities.

Senator BRYAN. Thank you. Mr. Arquit, would you agree that, in general, the scope of American antitrust law ought to be able to reach anti-competitive practices which are conceived and executed offshore but which directly impact the American marketplace?

Mr. ARQUIT. If there is a direct impact on American competition, on American consumers, I think there should not be a difference if the conduct took place abroad. The answer is yes.

Senator BRYAN. And you spend a good bit of time in your testimony describing to us some of the practical difficulties that you face, not only in terms of jurisdiction but in working with foreign governments in the discovery process, access to production of documents and all of that.

I acknowledge that there are some real practical difficulties in proceeding on these cases. However, I'd also like information on the policy, the attitude, of the Commission with respect to undertaking cases that involve anticompetitive practices which exist in foreign countries which directly impact us here in the United States? Is there a policy, a guideline?

Mr. ARQUIT. Well, there is no formal guideline as such, but the Commission enforces the antitrust laws without making distinctions between whether the actors are foreign or domestic, as long as there is jurisdiction. You have presupposed jurisdiction by assuming that there is a direct, substantial, and reasonably foreseeable impact on U.S. competition.

Issues of comity, if you want to call it that, are considered. I cannot think of a case where the Commission failed to take enforcement action because of that consideration.

Senator BRYAN. Would you agree with Mr. Constantine's opinion that, indeed, the standard that was imposed by the Supreme Court in the case in question is an unrealistic standard? Even if one has by deliberation, calculation, and design targeted American industry for its destruction, that that apparently is insufficient, as I understand his testimony? One must make an additional finding that, indeed, the offending party, the aggressor, if you will, must have the economic ability to recover whatever the losses were for that practice in terms of its own bottom line?

Mr. ARQUIT. I am not able to comment on the testimony insofar as it had to do with the government's position in that case. That position was taken before I was here and it was taken by the Justice Department. The FTC, as I understand it, was not a signatory to that brief. I do not claim to be an expert on the *Matsushita* opinion, but I think there are probably a couple things that might be brought out.

First of all, as I understand that case, it had to do with a conspiracy to predate. Predation can be an antitrust violation if it involves a single firm, if a single firm sells below its costs and is able to obtain monopoly power, then you have single firm predation, whether or not that firm is in the United States or abroad, as long as there is jurisdiction over the party abroad.

What I understand was concerned in the *Matsushita* case was a conspiracy to predate. And as I see the case there, it was a failure

of proof. In my view, and it is only that, if you can show by direct evidence a conspiracy to predate, you may very well have a per se violation of the antitrust laws.

But in that case the Court found that there was not direct evidence of a conspiracy. As you all know from your days as prosecutors, as attorneys general, when you do not have direct evidence of a conspiracy, you have to try to show it by inference. You have to try to show that the conduct would not have taken place on an individual basis.

And the Court found that there was no economically rational reason why these companies would conspire together to lower their prices below cost, to sell, in a situation where they were actually losing money, when it had taken place for a period of 20 years and they still did not have a monopoly. The Court in that case found, and I do not know what the situation is today, I am merely reading from the case, that even at the time of the case, the largest players in the market were not Japanese but, in fact, were RCA and Zenith, with a market share of 40 percent. So it simply had to do with the fact that the Court said as a matter of proof you have to show evidence of a conspiracy.

If you found direct evidence of a conspiracy, I do not think you necessarily have to go into all these other factors. But in the absence of that, you have to have some proof to carry the day in court and that proof would have to be by showing that these people would not have undertaken this conduct independently but only had the incentives to do so had they done so collectively.

Senator BRYAN. Mr. Arquit, obviously we cannot debate the full implications of the case. Would you agree that in the case in question, that the Court did develop a new standard in terms of a burden of proof or is it your view that that has historically been the law, this does not break new ground?

Mr. ARQUIT. I do not think that the case really did break new ground. There have been cases since then which have made this clear. Judge Easterbrook in the Double A Poultry case has seemed to develop that. The point that is made in these cases is that anti-competitive intent is very hard to show. According to Judge Easterbrook, every competitor has an intention to put his competitor out of business. That is what competition is all about. Where do you draw the line as to what is an anti-competitive intent?

Sales below costs are often hard to ascertain, because how do you measure cost? Do you include R&D? Do you expense it or capitalize it? So one way to focus on the issue is to look at the end result and to say, would it be possible for these people not just to attain monopoly power but to maintain monopoly power; to be able to have that power long enough and raise prices above a competitive level long enough to recoup the losses that they incurred while they sold below cost.

Senator BRYAN. I understand your argument. Would you not acknowledge that at least in terms of the practical implications of all of this, by and large the American electronic industry has been devastated in the last 20 years? The impact of these and other kinds of actions by foreign competition has, in effect, destroyed the industry in this country? Hasn't that been the practical effect, by and large?

Mr. ARQUIT. I do not have that information. I will say that——

Senator BRYAN. But you are a consumer. You go out there and buy things. By and large, aren't most of the things that we as consumers buy, at least in terms of consumer electronics, most of them aren't produced in this country, are they?

Mr. ARQUIT. I do not know the answer to that. It is true that I own Japanese-manufactured products, to be sure.

Senator BRYAN. Well, all of us do, I am sure. Thank you very much, Mr. Arquit. I will yield now to Senator Gorton.

Senator GORTON. I guess I may say in passing with a slight degree of amusement, that yours is the first indirectly favorable comment on Mr. Baxter that I remember in the years that he held that position in the Justice Department.

I would like to ask you, in the four years since the handing down of the *Matsushita* decision, whether you believe that the Japanese have attained, or do you believe that they already had attained by 1986, monopoly power in the American market?

Mr. CONSTANTINE. I believe that by the time the case was argued on November 12th, 1985, the market was in the possession of Japanese companies. Now, if it was in possession of individual companies, that would not create an antitrust problem, but if that was the result of concerted activity, especially with the connivance or the cooperation of the Japanese government, then that should have stated an antitrust violation.

Senator GORTON. You are using the "if". Is it your personal belief that the latter was the case?

Mr. CONSTANTINE. Absolutely. And right now the attorneys general, of all of the states, are working on cases involving vertical price fixing, which we believe is the next step in the saga. The Japanese companies in early 1989, on a collective basis all came into the United States market with aggressive vertical price fixing policies, aggressive cooperative advertising policies, and it is now recoupment time. Now is the time to get the money back.

And as you know in the 1986 *Minolta* case and the 1989 *Panasonic* case we did a little thing, a little effort to try to deal with just the very tip of that iceberg. And there is another case in the pipeline now, and it involves both of your states. But the law in several respects, as it deals with predation, as it deals with the issue of intent and as it deals with the vertical price fixing issue in and of itself, is insufficient to deal with that problem.

The case that was alluded to by Mr. Arquit, the recent decision of Judge Easterbrook, the poultry farm case, is a case in point. In that case there was direct evidence. There were hot documents saying "we want to destroy our competitor," but Judge Easterbrook held, and he held this as an extension of the doctrine of *Matsushita* and the 1984 doctrine of *Monsanto*, that intent is irrelevant. It does not matter whether somebody wants to destroy their competitor.

Does this person, does this company have the ability to make it stick? Do they have the ability, even if they destroy them, to make back the lost profits? If they do not have the ability and if it cannot be demonstrated by an economist that that judge particularly likes and went to the same school that the judge went to, which might be in Chicago, if that is not true, then the fact that there is a hot document, and the fact that there is blood all over

the floor and that competitors have been destroyed is irrelevant because all we are concerned about is whether predation made sense. And it would only make sense if they have the plausible economic means to make back the money by the time we have gotten to court.

Senator GORTON. Well, you have at least in part anticipated the next question in my train of thought. I take it it is your view that beginning no later than last year, this group of Japanese companies have begun to impose monopoly costs in the American market?

Mr. CONSTANTINE. Precisely. And there are other much more important costs. I also think, Senator, the ability to dominate industry leads to domination in future industries, and adjacent markets and adjacent technologies. You are going to hear from Go-Video, I understand.

Now, the important part of the Go-Video story for me is not how difficult it was for them to get to the market with their product and how successful they were, the interesting part of the story was when they finally had to have their double deck fabricated, they had to go to Asia to have it done. There are no productive facilities in the United States that can even make that product any more.

So the ability to dominate now, although it is somewhat less profitable than the Chicago school would hold is necessary, may lead to you dominate the next market, the next industry, the next product. This whole debate about high-definition television, one of our problems is not our ability to produce this technology, but to actually fabricate the stuff once we have the technology. There is a long-term issue here.

I have seen documents which indicate that there are certain companies and certain industries targeted for destruction, not in a year or two years, but in 10 years, or 20 years, or in a hundred years.

And I think that the Congress now has to deal with that issue, take the long-term view of these things, not whether in the next six months or a year somebody is going to be able to turn a quick profit on their predation.

And I think there is now, there was not at the outset, but there is now a defect in the law. I will be submitting a proposal to deal with that.

Senator GORTON. Mr. Arquit, you have been sitting next to Mr. Constantine. With what part of his answers do you agree or disagree? With what part are you simply skeptical?

Mr. ARQUIT. Putting aside the policy concerns, there was some mention of vertical price fixing, and I assume that to mean agreements to maintain resale prices. My view is that the Federal Trade Commission is primarily an enforcement agency, and it is not our job to second guess the legislation passed by Congress. Agreements to maintain resale prices are presently seen as being, per se, illegal. If we find that kind of conduct, I assure you that I will recommend those cases to the Commission.

In terms of the predation aspects of it, I understand the long-term aspects of what has just been talked about, the fact that documents talk about destruction of competition, not in a few years but many years later, which means the parties do not intend to have

recoupment until that period of time. I do not see even the existence of those facts as being in any way inconsistent with the goals of competition policy set forth by the Court in the *Matsushita* case. The Court said if you can show a recoupment story, then there is a case. That is some evidence of a recoupment story.

It does not have to be shown in a particular period of time. I think most people would agree that the longer it takes to actually obtain the recoupment, the less chance there is of a conspiracy because do not forget, in the whole interim period, you have got to police how you are going to allocate the losses that take place throughout the conspiracy. You have got to, in advance, allocate how the gains are going to be taken back by the companies once recoupment starts to take place.

All very complicated, not to say that it cannot occur, but there should be some story before you deprive consumers of the benefit of lower prices.

In all of this seems to be forgotten is the fact that in at least the short run, during the entire period of alleged predation, consumers are buying products much cheaper than they otherwise would. And a low price today followed by a competitive price tomorrow because the predatory pricing is ineffective is a gift to consumers. Where consumers are injured is in the situation where there is the very low price today and tomorrow the manufacturers are able—the remaining manufacturers are able to charge prices above the competitive level and recoup that amount. That hurts consumers. We want to get at that conduct.

Senator GORTON. If from the point of view of domestic prosperity, taken in its broadest sense, the Japanese keiretsu practices are highly successful and they allow high penetrations of foreign markets, would we be better to join them, Mr. Constantine, and allow the same kind of practices on the part of American industries rather than fight them?

Mr. CONSTANTINE. No, I do not think we gain anything by trying to emulate somebody else's successful model. Without making any value judgment about the Japanese or the European model, I think we do best when we accentuate what we do best.

I think we are a competitive country. I think we do very well by ripping each other apart in the marketplace and by tearing each other apart and that is the way we succeed. We are not talking about a system that emanated in the 1930's or in the 1920's in Japan. We are talking about a system in Japan which is a logical extension of several thousand years of their cultural history. And it works for them, but I do not believe it would work for us.

I think we are a different sort of an animal, and I think that we would be best at encouraging competition, encouraging vigorous competition and making sure that at least when things cross our border, that we are not allowing other people to violate the laws which we will not allow ourselves to violate.

Senator GORTON. If that kind of activity is historically driven in Japan and if some similar kinds of activities are historically driven in Europe, would it be better American policy, then, to attack them, as they manifest themselves in the United States, by adopting a tough trade policy? This policy would say that, one way or another, we are going to work on the bottom line: the Japanese

will sell no more dollars worth of goods in the American market than we sell in theirs and let them settle how they reach that particular goal?

Mr. CONSTANTINE. I have an opinion on that, Senator, but it is a lay opinion. I consider myself, although some might not, I consider myself an antitrust expert, and I can tell you what I think about antitrust. I have a lay opinion on that and I tend to agree with you, but I think you would be better off talking with somebody like Clyde Prestowitz or Karel Von Wolferin about those types of issues. I do not feel competent to answer.

Senator GORTON. I feel more confidence in your answers to the questions on which you are an expert when you decline to answer a question like that. I appreciate it very much. Thank you, Mr. Chairman.

Senator BRYAN. Mr. Arquit, before calling upon Senator McCain, I must say that your argument that in effect we ought not to be too aggressive because consumers benefit by lower prices as a consequence of the practice suggests to me that we sow the seeds of our own destruction. That was precisely the argument made during the semiconductor dumping in the 1980s—in effect, American consumers benefit as a result of the Japanese coming into this market, underselling and undercutting.

The consequence of that folly is that by and large the American semiconductor industry was nearly wiped out, and today American industry as well as national defense is held hostage to Japanese supply for semiconductors. So with the greatest respect, I would hope that that philosophy does not continue to prevail, and I apologize to my colleague, Senator McCain. I yield to him.

Senator MCCAIN. Thank you, Mr. Chairman.

Mr. Constantine, you said that the aspect of the Go-Video case that intrigued you was they had to go overseas to find a manufacturer. Does it intrigue you that perhaps if they had been able to go into business seven or eight years ago, there might have still been an industrial base here in the United States so they would not have had to go overseas? Does that intrigue you, too?

Mr. CONSTANTINE. The whole matter and the whole issue is a very interesting issue, and I think it is basically treated by the American population, people who read the newspapers, as a victory in an era of defeats. What I indicated, Senator, was that the disturbing, intriguing in the disturbing sense, part of the story was to me, that having won all these victories, having won their legal victories and finally being able to do what they wanted to do, they could not have the machines made in the United States. I am old enough to remember when those machines were made in the United States, when I bought audio components which were made in Cambridge, MA.

Senator MCCAIN. Well, let me say, sir, that first of all I view it as a victory, too, the fact that they were able to go into business when there were clearly enormous forces arrayed against them to prevent this from happening.

I think that it is not so much intriguing as it is alarming that a company should have to take all these years in order to be able to compete in the open market. And by the time they are able to compete, the industrial base has been so eroded that they have to go

overseas. I think it is a matter of concern, and I think it is a compelling argument that perhaps we should force a small company to go through six, seven, eight, ten years of litigation and struggle before they are able to market a product, not only in this country but throughout the world.

Let me also ask you, Mr. Constantine, have you ever been in the free enterprise system, ever been in business, electronics or any of those kinds of activities?

Mr. CONSTANTINE. No, I have not been in business. I am the son of a small businessman.

Senator MCCAIN. But your background is primarily legal; is that correct?

Mr. CONSTANTINE. Correct, just a government drudge.

Senator MCCAIN. And I certainly appreciate your ability to hold your beliefs, and I not only respect them, but I admire your articulate fashion of presenting your views before this Committee. But, very frankly, when in the end of your testimony you said Congress should grant the U.S.-owned and based companies full antitrust immunity to jointly research, develop, produce and market technology, et cetera, my belief is it will not work.

Mr. CONSTANTINE. Senator, I think if you read my testimony, it was my belief it will not work also, if you read the testimony.

Senator MCCAIN. I am quoting you. Your belief is that it will not work. And as a lawyer, which you are, I can certainly see that you might have that view from a legal standpoint. But I can present you with an array of individuals who have had broad experience in the free enterprise system, who have had to try to compete with the Japanese on a broad variety of fronts, who will clearly disagree with your "belief". They believe that when you are competing against mega-corporations who have massive R&D resources and marketing capabilities, it is very, very difficult to compete on a level playing field.

So although, as I say, I not only respect, but admire your beliefs, I question your credentials to make that kind of judgment when the weight of opinion of the electronic and high-tech corporations across this country, people like Admiral Bobby Inman and others have testified before this Committee, that if we are going to compete effectively, that we need to grant some relief of some kind. Perhaps not the "broad brush" treatment that you have recommended in a single instance, but we have to get them on a level playing field, and I strongly support their views that, right now, they are competing on a very unequal basis. But, as I say, I appreciate your views.

I do question your qualifications to make those judgments. Thank you, Mr. Chairman.

Senator BRYAN. Thank you very much, Senator McCain.

Mr. Arquit, you wanted to comment.

Mr. ARQUIT. If I might, one comment, Senator. What you mentioned at the end with respect to the semiconductor industry, I am not sure that we disagree about that. My comments have to do with application of the competition laws and that is certainly not the end of the public policy of the United States. That is why there are anti-dumping laws as well, which the ITC enforces, and to the extent people are violating the anti-dumping laws, they certainly

should be enforced. The fact that someone is not violating the competition laws does not mean that they also are not violating antidumping laws. I am not sure there is disagreement there.

Senator BRYAN. I appreciate that clarification. My concern, Mr. Arquit, is that an argument was made by those that were in charge of the policy control levers of the Federal Government in the 1980s that American consumers will benefit by these practices, that prices will be lower, that we ought not be concerned about dumping.

Those statements were made. No need to worry. Don't be concerned about it. The consequence of that has been a disaster unparalleled in the history of American enterprise. In effect, you allow those who practice those kinds of pernicious activities to destroy their competitors in this country. Then, as Mr. Constantine argues, not only is that industry affected, but there is a spin-off impact which makes it impossible for other related industries to survive without a heavy dependence upon that primary industry. We will hear testimony this morning to indicate that, in order to gain access to semiconductor chips, there are parallel concessions that are extracted from American business, such as licensing certain types of activities that have recently been patented. I think that is a very dangerous thing, and I hope that you and the Commission would agree we ought to be concerned about that.

Mr. ARQUIT. I understand.

Senator BRYAN. Thank you very much. We appreciate your testimony, gentlemen, and we will look forward, Mr. Constantine, to hearing from you in written form as to your proposal.

[The following information was subsequently received for the record:]

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August 1, 1990

Honorable Richard Bryan
United States Senate
Committee on Commerce,
Science and Transportation
Washington, D.C. 20510

Re: Hearing of July 19, 1990
Concerning Antitrust and Competitiveness

Dear Senator:

It was an honor and pleasure to testify before your Subcommittee on July 19, 1990. This was especially so because you and Senator Gorton are held in such high esteem by your friends in the National Association of Attorneys General.

As you requested, I herewith enclose draft legislation to address the defect in current antitrust law interpretation exemplified by the 1986 Matsushita decision and similar cases.

This bill would sanction defined anticompetitive conduct, i.e., concerted activity intended to eliminate competitors or bar their entry into a market. The bill would also prohibit such activity by a single firm which possessed monopoly power or was attempting to secure such a dominant position. Antitrust sanctions and injunctive relief would apply whether or not the predatory conduct can be shown to be economically rational or likely to produce short term profits in the targeted industry.

An alternative approach would direct the Courts to expand their inquiry into the various ways predatory conduct can produce long term economic benefits to the predators. However, this would invite an open ended and unfocussed inquiry which the Courts would not welcome and which they are ill-equipped to undertake in the context of any single antitrust case.

I am gratified to see that you have taken a leading role in advancing the discussion of the relationship between antitrust and competitiveness. The hearing of July 19, 1990 was a major step in this regard. The testimony was focussed, factual and avoided sloganeering and simplistic answers. I hope that my draft bill will assist in your effort and that you, Senator Gorton and other members of the Committee will call upon me for assistance in the future.

Sincerely,

Lloyd Constantine

Lloyd Constantine

Senator BRYAN. Our next panel consists of Terren Dunlap, chief executive officer of Go-Video, and Mr. T. Boone Pickens, general partner of MESA Limited, and Julian Morris, president of Automotive Parts and Accessories Association.

We will begin this panel's testimony by hearing first from Mr. Terren Dunlap, and I would ask those that have conversations with our prior panel, they might adjourn outside the room so we would have the benefit of Mr. Dunlap's testimony.

Welcome, and we are pleased to have you with us this morning. Let me yield the floor to you, Mr. Dunlap.

STATEMENT OF R. TERREN DUNLAP, CHIEF EXECUTIVE OFFICER, GO-VIDEO, INC.

Mr. DUNLAP. Thank you for inviting me this morning. Mr. Chairman and distinguished members of the Committee, the U.S. electronics industry is in trouble—big trouble. In the past decade Americans have purchased 80 million video cassette recorders and for the past five years have been snapping them up at the rate of 1 million per month, or 33,000 per day, and incredibly, not one of these VCR's is designed, engineered or manufactured in the U.S.—not even any VCR components.

Yet this one product, the VCR, contributes $5 billion to the U.S. trade deficit every year. Did you know that the VCR technology was actually invented in the United States by Ampex in the 1960's? True; and equally true, by 1975 the technology had been completely gobbled up and exploited by Japanese manufacturers?

Whatever happened to all those electronics companies we all grew up with? Names like Admiral, Emerson, Quasar, Magnavox, Sylvania, Philco, GE and good old RCA? They have ceased manufacturing, out of business, or sold to foreign companies, that's what.

As for electronic products with American-sounding names—Penney's, Sears, Jensen, Kenwood, Zenith, Radio Shack, Fisher—every single one today is manufactured by Japanese companies like Toshiba, Hitachi, JVC, Sony and Matsushita. Are there any major manufacturers of VCR's, TV's, radios, Fax machines, telephones, and cameras in the United States? The answer is no. Almost all are Japanese-made.

Three times larger than the automobile industry, electronics is the largest manufacturing industry in the United States, an industry that last year contributed $20.5 billion to our trade imbalance with Japan, and consumer electronics is the driving force behind this massive disparity. The Japanese cartels, the keiretsu or zaibatsu, have swallowed up our consumer electronics industry through business practices that have been described as economic totalitarianism. First radios, then phonographs, audio recorders, then TV's, now VCRs. What is next?

The news is not all bad. Go-Video, a publicly-owned American company based in Scottsdale, AZ, has invented, patented and recently introduced a dual-deck VCR that will revolutionize private television communications, can provide thousands of jobs in the U.S. and help put America back into a $44 billion consumer elec-

tronics market. The applications of the VCR-2® for business, education, government and home entertainment are staggering. Yet this revolutionary new product now starting to appear on American dealer shelves did not get there without an incredible seven-year struggle which pitted our company against the huge and powerful Japanese electronics cartels.

It was a long, expensive and difficult fight in which we were boycotted at every turn.

Forced to seek civil remedies, Go-Video filed an antitrust complaint in Federal Court in Phoenix, AZ, against a number of foreign manufacturers for conspiracy to prevent the marketing of a dual-deck VCR in the United States. The U.S. District Court of Appeals recently affirmed on our behalf that American companies damaged by foreign cartels can bring suit against those foreign companies and gather testimony in foreign lands for trial in the United States courts.

Yes, American industry does have hope of defending itself against the Japanese cartels. But as Go-Video discovered, so slowly and painfully, the necessary tools with which to fight our own antitrust laws are not easily invoked. The difficulty is in getting our government and courts to enforce them.

It is ironic that in recent SII talks, our government demanded, and the Japanese government agreed, to enforce criminal sanctions in Japan against violators of the Japanese anti-monopoly laws; yet our own government has not brought one major criminal or civil action under U.S. antitrust laws against these illegal cartels that have systematically targeted and conquered one American industry after another. What are we waiting for?

Mr. Chairman and members of the Committee, I am not asking for new legislation, only that Congress enforce antitrust laws already on the books. Impose the same rules on Japanese industry as you do on American industry. This is how we can return innovation, invention and entrepreneurial spirit to the United States and guarantee that U.S. products will not be held hostage by the Japanese bureaucratic industrial complex.

Mr. Chairman, toward that end, I respectfully request of the Committee that you insist the Department of Justice and the FTC enforce U.S. antitrust laws to stop the illegal business practices of the Japanese cartels. Our antitrust laws are as important to our economic system as the Bill of Rights is to our Constitution. Thank you.

Senator BRYAN. Thank you very much, Mr. Dunlap. As an aside, I would say it is pretty hard to argue against the proposition you are advancing as far as this Senator is concerned. Mr. Pickens, we will hear from you now, sir.

STATEMENT OF T. BOONE PICKENS, JR., GENERAL PARTNER, MESA LIMITED PARTNERSHIP

Mr. PICKENS. Mr. Chairman and members of the Consumer Subcommittee, my name is Boone Pickens. I thank you for the opportunity to share my views here today.

I have recently returned from Koito Manufacturing Company's annual meeting in Tokyo, and I would like to share that experi-

ence. Seventeen months ago I became the largest shareholder in Koito, a Japanese auto parts supplier. My involvement in Japan has convinced me that the Japanese are gaining the upper hand in world economy, not because they are more creative or industrious but because of anti-competitive business practices. The Japanese keiretsus are a perfect case in point.

If I might take a second to explain. I see things black or white and pretty simply, too. When the keiretsu system was first explained, I said, "It sounds like a pyramid." In our case, Koito Manufacturing Company sits in the pyramid headed by Toyota at the top. The pyramid continually crams down on all members within the pyramid. Let me give you an example.

Toyota has had record revenues for three years and record profits for three years. Koito has had record revenues for three years, and we have had down profits by 30 percent. Toyota gets all the revenues and then decides how we are going to come out late in the year. They take record profits, and we take down profits by 30 percent.

I own 26 percent of Koito. Toyota owns 19 percent but reaps 100 percent of the benefits of Koito because they have full control of it. Keiretsus inflate the price of consumer goods in Japan to subsidize greater market share in foreign countries, including the United States. These producer-oriented keiretsus serve not only to enhance the economic power of the corporate elite in Japan, but stifle foreign competition as well.

The keiretsu was never more evident during the annual shareholders meeting of Koito held on June 28, 1990. That date, June 28, is when all other shareholders meetings are held in Japan. Over 1,200 companies held annual meetings on that very day at the same hour. So, you can see what opportunities a shareholder has to participate; you can only go to one meeting.

Along with 50 other American shareholders, I attended the annual meeting and offered seven proposals. The Koito board and Toyota took none of the proposals seriously and did everything possible to frustrate the attempts of the American contingent to discuss these matters. For three hours we were ignored by the board, heckled, cursed and verbally abused by a crowd of Japanese shareholders.

I would like to share with you some of the caustic remarks yelled at the Americans. I have chosen not to repeat the profane, unprintable comments. Here is a sample of what we heard for three hours. "We won the economic war;" "Go home, Yankee, go home," and, "Remember Pearl Harbor."

Also, directed at an American woman shareholder, who stood for three minutes before the microphone before the crowd settled down so she could ask a question, was this question! "What is your job? You are a stripper, aren't you?" Hecklers also shouted, "An American cannot manage a Japanese company" and "Go ahead, suit yourself in the U.S. Congress, see if we care, we are not afraid of the U.S. Congress."

These are just a few, but I think you can imagine my anger at such treatment in light of the openness that we afford Japanese investors in the United States. I am convinced now more than ever before that the corporate elite in Japan simply do not want any

Americans in Japanese board rooms. They do not want anyone they cannot control with their set of rules.

I am also convinced that the actions of the Japanese auto manufacturers, both in Japan and the United States, raise antitrust concerns. Keiretsu parents like Toyota set artificially low prices for their parts suppliers. These below market prices shut out competitors, especially U.S. parts makers, out of the market in Japan. Moreover, the keiretsu parents engage in a group boycott refusing to buy parts in any significant quantities, except from their captive suppliers.

If the Japanese auto makers use these practices here in the United States, they are violating our antitrust laws. I am encouraged that the FTC is investigating the keiretsu system and potential antitrust violations that may result from importing the system to the United States. The Japan Fair Trade Commission has not prosecuted a case since 1974.

I recommend that the Committee examine the final report on the Structural Impediments Initiative. It is time to insist the Japanese government implement the promises contained in the final report. The Boone Co./Koito situation provides a perfect test case to see if the promises in the report will be kept.

For the past seventeen months, I have been stonewalled in my attempts to exercise rights routinely granted to shareholders in the United States. While I have been pushed aside repeatedly by the Toyota and Koito boards, Japanese investors have had no trouble at all entering U.S. markets. Even Japanese investors with a minority stake in U.S. companies obtain seats on our boards.

Mr. Chairman, this has been a tough fight for me. The rules written and unwritten favor the status quo as defined by the corporate elite in Japan. For the past few decades, corporate Japan has planned carefully and is now executing an economic assault on the world marketplace.

During the same time frame, the United States was of necessity preoccupied with the defense of democracy. The circumstances have now changed dramatically. The new imperative is not a military threat but an economic challenge. Thank you.

[The statement follows:]

STATEMENT OF T. BOONE PICKENS, JR., GENERAL PARTNER, MESA LIMITED PARTNERSHIP
CHAIRMAN, BOONE CO. 1/

Mr. Chairman, and members of the Consumer Subcommittee, my name is Boone Pickens. I thank you for the opportunity to share my views here today. Also, I commend you for providing this forum to discuss the potential antitrust problems raised by the Japanese keiretsu system.

Mr. Chairman, a little more than 18 months ago I had never heard of the term keiretsu; I darn sure didn't know how to spell it. Unfortunately, the vast majority of American consumers and business leaders are just as unaware of and unconcerned about the Japanese keiretsu as I was just a few months ago. In fact, many U.S. policy makers suffer from the same indifference about the threat that this anti-competitive system poses to the economic future of America. Your efforts here today are important. This hearing will shed more light on the closed economic system that dominates Japan and encroaches upon world markets every day.

Boone Co.'s Investment

I first learned some of the hidden aspects of the Japanese economic system when my private investment firm, Boone Co., purchased approximately 20 percent of the stock of Koito Manufacturing Company, Ltd., a Japanese automotive lighting company. Since our initial purchase in March of 1989, we have increased our holdings to approximately 26 percent. Today, we are the company's largest shareholder. The company's next largest shareholder, Toyota Motor Corp., owns approximately 19 percent of the Koito stock.

Initially, a lot of people questioned my business judgment when I bought such a substantial minority stake in a Japanese company. In retrospect, I admit that my progress has been a little bit slower than I had anticipated originally. Once becoming a shareholder, I soon found out that, as a result of the "keiretsu" system, Toyota is able to exercise virtual control over the corporate affairs of Koito. Despite the fact that Toyota owns only 19 percent of the Koito stock, the company functions like a subsidiary of Toyota.

The Anticompetitive Keiretsu System

A "keiretsu" is a pyramid-like structure that includes several layers of suppliers at the bottom of the pyramid and a controlling manufacturer at the top. Within major Japanese industries, such as the automotive industry, there may be several keiretsus in operation. For example, Toyota sits at the top of its keiretsu, above several layers of suppliers that provide a stable source of automotive parts at a dependable price. Nissan and Honda, the other two major automobile manufacturers in Japan, also have developed similar keiretsus.

The keiretsu parents exercise control over their family members in a number of ways. For instance, Toyota has placed

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1/ The exhibits were not reproducible and are in the subcommittee files.

three of its former corporate executives among the top management officials at Koito. These three officers and directors had served a total of almost 70 years with Toyota prior to assuming their responsibilities at Koito. In a corporate culture that emphasizes lifetime employment and loyalty to a single company, I have a strong belief that these three officials look out for the interests of Toyota as they conduct the affairs of Koito.

Keiretsu parents also exercise control by loaning their suppliers money for expansion. As a supplier's chief creditor, the keiretsu parent can determine a supplier's day-to-day policies, as well as the strategic plans for the long term. A supplier in this position will be forced to expand and contract at the direction of the keiretsu parent.

Also, as the primary customer of a supplier, keiretsu parents can dictate the pricing policies of their respective suppliers. For instance, Koito regularly must institute cost reductions to protect Toyota's profit margin. Increases in productivity rarely account for the entire cost reductions, so Koito must reduce its own profits to make up the difference. In effect, Toyota receives "hidden dividends" which, of course, are not realized by the other Koito shareholders.

During the first few months after Boone Co. acquired the Koito stock, I was introduced to the ways of the keiretsu system. Despite being the largest shareholder of Koito, I was unable to obtain even the most rudimentary financial data about the corporation. The Koito board stonewalled my requests to look at the book and records of the company and provided only unresponsive answers to my questions. As a last resort, I filed a lawsuit in Japan to compel the production of these records.

My efforts yielded only one direct response -- the Koito board accused me of attempting to greenmail the company. Nothing could be further from the truth. I have delivered to the board an affidavit stating that I am not seeking and will not accept greenmail even if it is offered. Also, at the annual shareholders meeting I offered an anti-greenmail amendment to the by-laws. The proposal, by the way, was rejected.

Since acquiring the Koito stock, my goal has been to assure that Koito's management operates the company in the best interest of all of the shareholders rather than in the best interest of Toyota. I had hoped to convince the board of directors that Koito could be more profitable if it acted independently of Toyota's control. Unfortunately, the power of the keiretsu has been too strong.

The 1990 Koito Shareholders' Meeting

The keiretsu was never more evident than during the annual shareholders' meeting of Koito held on June 28, 1990. Along with approximately 50 other American shareholders, I attended the annual meeting and offered seven proposals to increase the independence and profitability of Koito and enhance the accountability of management to the shareholders. These proposals were: (1) amend the by-laws to ban the payment of greenmail; (2) award Boone Co. four seats on the board of directors; (3) prohibit Koito from participating in any anti-competitive practices, such as price-fixing; (4) require Koito to provide to all shareholders its pricing policies for products supplied to its largest customers; (5) provide shareholders an accounting of the corporate slush fund called the shito-fumeikin; (6) require shareholder approval for each director's compensation and retirement; and (7) increase the annual dividend to shareholders.

The Koito board of directors took none of these proposals seriously and did everything possible to frustrate the attempts of the American contingent to discuss these matters at the shareholders' meeting. For three hours we were ignored by the board and heckled, cursed and verbally abused by the crowd and the other shareholders. I am no stranger to tough corporate battles, but my treatment in Japan was beyond comprehension -- simply an outrageous example of corporate arrogance.

I would like to share with you some of the caustic remarks directed towards the American shareholders. I have chosen not to repeat the profane, unprintable comments.

"We've won the economic war!"

"Yankee, go home!"

"Remember Pearl Harbor!"

"What is your job?" You are a stripper aren't you? (Directed to an American woman shareholder)

"An American cannot manage a Japanese company!"

"Go ahead, suit yourself in the U.S. Congress. See if we care. We are not afraid of the U.S. Congress!"

"We don't care about SII!"

These are just a few, but I think you can imagine my anger at such high-handed treatment in light of the openness that we afford Japanese investors in the United States. If Japanese

shareholders were treated similarly in this country, a lot of American corporate executives would be forced to resign in public disgrace. In Japan, its just business as usual for the keiretsu and the Japanese corporate elite.

I am convinced now more than ever before that the corporate elite in Japan simply do not want any Americans in Japanese board rooms. They do not want to expose a foreigner to the anti-competitive practices inherent in the Japanese corporate culture.

The Keiretsu Presents Antitrust Concerns

I am not a lawyer, but I am convinced that the actions of the Japanese auto manufacturers, both in Japan and here in the United States, raise antitrust concerns. In theory, the keiretsu system is supposed to provide the manufacturing parents a steady supply of component parts at stable prices. In practice, however, the keiretsu perpetuates anti-competitive practices and concentrates economic power and wealth at the parent level. Keiretsu parents like Toyota set artificially low prices for their parts suppliers. These below market prices shut competitors -- especially U.S. parts makers -- out of the market in Japan. Moreover, the keiretsu parents engage in a group boycott, refusing to buy parts in any significant quantities, except from their respective suppliers. Finally, the maintenance of these predatory pricing policies and the group boycott may involve the express agreement of the keiretsu parents.

If the Japanese auto makers are using these practices, Japanese or U.S. antitrust laws are possibly being violated. We need to find out if this is the case, and there are two ways to approach this potential problem.

First, I am encouraged that -- due in large part to the request of the Senate Commerce Committee -- the Federal Trade Commission is currently investigating the keiretsu system and the potential antitrust violations that may result from the importation of the system to the United States. If the Commission devotes sufficient staff and resources to this investigation, I am certain that the Congress will have the information necessary to address this problem. Mr. Chairman, I encourage you to give this matter your close attention to ensure that the FTC thoroughly examines this issue.

Second, I suggest that the Committee examine the conclusions and the recommendations contained in the Final Report on the Structural Impediments Initiative. According to the Final Report dated June 28, 1990, "There is a view that certain aspects of the keiretsu relationships . . . promote preferential group trade, negatively affect foreign direct investment in Japan, and may give rise to anti-competitive business practices." In response to these concerns the Japanese government -- through the Japanese

Fair Trade Commission -- has agreed to initiate more formal actions to address violations of the Antimonopoly Act. Specifically, the Final Report states that Japanese Fair Trade Commission "will rigorously deal with such conduct as price cartels, supply restraint cartels, market allocations, bid-rigging, and group boycotts, and will take more formal actions against them when they are found in violation of the Antimonopoly Act." I have attached as Exhibit A the relevant portions of the Final Report.

While the language of the Final Report is a concession by the Japanese government that the keiretsu system poses a potential problem, the mere admission of a problem will not result in a solution. After all, years and years of trade negotiations with the Japanese have resulted in many concessions on paper, but few material, economic results. I think that it is time to insist that the Japanese government take definitive action to implement the promises contained in the Final Report.

The Boone Co./Koito situation provides the perfect test case for implementation of the directives contained in the Final Report. On April 10, 1990, Boone Co. filed with the Japanese Fair Trade Commission a Request for Investigation of the unfair trade practices in the Japanese auto parts industry, which I have included as Exhibit B. The request calls for the Japanese FTC to examine potential violations of the Antimonopoly Act resulting from the keiretsu relationships of the major Japanese auto manufacturers. If the Japanese government is truly serious about the commitments made in the Structural Impediments Initiative, then this investigation should receive the highest possible priority at the Japanese FTC.

Also, the U.S. Federal Trade Commission should make every effort possible to cooperate with the Japanese Fair Trade Commission in the keiretsu investigation. The two agencies should pool their resources to examine the potential impact of the keiretsu system on consumers and suppliers in the United States and Japan. Extraterritorial disputes should not be permitted to frustrate a thorough examination of potential anti-competitive practices in the global marketplace. Multi-national corporations engaging in anti-competitive practices should not be able to hide behind the borders of their home country to shelter themselves from the laws of other countries in which they operate.

The Keiretsu System Perpetuates Inequities

For the past year and a half, I have been stonewalled in each one of my attempts to exercise rights routinely granted to shareholders in the U.S. In the oil and gas business I am used to drilling some dry holes. But while I have been pushed aside

repeatedly by the Koito board, I have noticed that Japanese investors have no trouble at all entering U.S. markets. Let me cite a few examples.

-- Boone Co. cannot get board representation at Koito, but hundreds of Japanese investors are represented on the boards of American companies. Even Japanese investors with a minority stake in U.S. companies gain entry to the board room. I have included as Exhibit C a survey of U.S. manufacturing companies in which Japanese firms own an interest similar to Boone Co.'s investment in Koito. Ironically, even Koito has a seat on the four-member board of North American Lighting Inc., the Illinois-based company of which Koito owns 39 percent. The survey results graphically illustrate the disparity between the foreign investment policies in Japan and the U.S.

-- The vast differences are not restricted to investment policy. Toys R Us must spend at least one or two years to gain permission to open a single retail store in Japan, while Ito-Yokado Co. Ltd., is currently negotiating the purchase of Southland Corp. which would result in the immediate acquisition of 7000 retail outlets throughout the U.S.

-- The same contradiction is evident in the auto industry. In 1989, U.S. auto manufacturers sold approximately 19,000 cars and trucks in Japan, while the Japanese sold 2.5 million imports and 1.3 million transplants in the U.S.

The examples are virtually limitless. I feel like Americans have to drive an ox cart over a mountain trail to gain access to the Japanese economy, while Japanese investors speed into the U.S. economy on a super highway in the air-conditioned comfort of a Lexus or an Infiniti. Mr. Chairman, the Japanese system is rigged; its just not fair.

We Must Respond to the Challenge

Mr. Chairman, this has been a tough fight for me. The rules -- written and unwritten -- all favor the status quo as defined by the corporate elite in Japan. For the past few decades, corporate Japan has planned carefully and now is in the process of executing vigorously an economic assault on the world marketplace. During that same time frame, the United States was, of necessity, preoccupied with the defense of democracy. The circumstances have now changed dramatically. The new imperative is not a military threat, but an economic challenge.

I know that Americans are ready to meet the challenge, but we need the help and support of the Executive Branch and the Congress to ensure that world marketplace, like the U.S. marketplace, fosters free and open competition. We're not asking for special treatment, we just want a "cop on the beat" to enforce the rules fairly and uniformly, without regard to nationality. If that action is taken, the entrepreneurial spirit that built our economic system will prevail and propel the U.S. into the 21st century as the leader of the free world.

Senator BRYAN. Thank you very much, Mr. Pickens. We will hear from you, Mr. Morris.

STATEMENT OF JULIAN C. MORRIS, PRESIDENT, AUTOMOTIVE PARTS AND ACCESSORIES ASSOCIATION, INC.

Mr. MORRIS. Thank you, Mr. Chairman, distinguished members of the Subcommittee.

APAA, our association, believes that keiretsus—car company headed industrial/financial groupings—intertwine car makers and suppliers so tightly that they pose the foremost structural impediment that we know of to U.S.-Japan parts trade.

Attached to my statement [1] are testimony and industry survey findings spanning a decade. They attest quantitatively and qualitatively to keiretsu's impact on our industry.

Keiretsu's bottom line toll on our industry may be summarized by, (1) the tenfold growth in the U.S. Japan auto parts trade deficit in the 1980s, (2) the less than 1 percent U.S. penetration of Japan's $65 billion plus auto parts market, (3) Japanese control of roughly 50 percent of the content of all cars sold in America, and (4) 23,000 net U.S. supplier jobs lost in 1988 alone, attributed by GAO solely to Big Three car production with 88 percent U.S. sourced parts being displaced by transplant assemblers using over 60 percent imported parts.

Moreover, keiretsu's impact is captured in USTR's 1989 conclusion that Japan's auto making/supplier "family" structure precludes "nonfamily" suppliers from "original equipment and replacement parts markets for Japanese vehicles." We believe this finding should trigger an alarming call to action and APAA is most pleased, Mr. Chairman, with your interest in assuring fair commercial consideration for our U.S. parts makers.

Through your leadership, Mr. Chairman, and that of Senators Hollings and Danforth, the Federal Trade Commission has initiated its important keiretsu investigation. APAA has urged the Commission to probe three keiretsu facets: (1) the closed procurement practices that thwart competition for the original equipment sold to build vehicles, (2) controlled replacement parts distribution that limits competition by curbing independent aftermarket sales and service and, (3) related distribution practices that limit American parts and accessories sales to Japanese nameplate dealer networks.

The common thread running through U.S. industry experiences in trying to crack OE markets invariably has been that Japanese OEMs tip the playing field advantage to their supplier families. The basis for this preference, indeed the very buttons that control keiretsus, are identified elsewhere and certainly most eloquently by Mr. Pickens' testimony.

We believe that when the various car company parents limit their significant parts purchases to family members only, they in effect build a supplier base that is captive, allowing each car company to control and dictate such policies as pricing and distribution in a manner that makes it virtually impossible for American firms or any nonfamily firm, Japanese or otherwise, to compete.

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[1] The attachments were not reproducible and are in the subcommittee files.

Keiretsu's anticompetitive impact is being replicated in the Japanese transplant market here. Indeed, even U.S. firms with transplant contracts have good reason to fear their displacement when keiretsu members relocate here. According to Department of Commerce survey results, "Current U.S. suppliers to Japanese companies manufacturing in the United States have been told they will no longer be a supplier once traditional Japanese suppliers have located in this country."

In other cases, Commerce notes that, "The United States supplier is forced into a joint venture with the traditional Japanese supplier in order to obtain transplant contracts." No panacea to an inequitable trading system, these often lopsided joint ventures tap the U.S. firm's Detroit customer base without delivering reciprocal access to the Japanese customers' vast home market production.

Japan's closed parts distribution web has joined the closed parts buying system in the U.S. It remains difficult for America's independent aftermarket retailers, distributors and service outlets to provide a full line of replacement parts to owners of Japanese nameplate cars.

When the parent is the sole major customer, it can dictate that its new car dealers be the sole channel for replacement parts sales. And, since the keiretsu system denies the U.S. and other independent parts makers the sufficient OE sales to make parts production economical, there are no competitive sources of supply.

Keiretsu family members control 75 percent of the aftermarket sales and service through the car dealer network and Japan's independent aftermarket holds an anemic 25 percent share. This is the absolute reverse of the robust competitive U.S. market for American nameplates where the 75 percent share held by independents long has benefited American consumers, producers, workers and our economy.

Third, the totality of keiretsu's control is manifested in its treatment of an array of American made aftermarket products for Japanese nameplates that do not require an OE production basis and are competitively manufactured. Despite their attractiveness, these parts and accessories have not made major inroads into the lucractive Japanese car dealer service parts markets either here or in Japan.

For example, one Japanese OEM's U.S. sales division wished to buy attractively priced service parts from a U.S. firm, which had been approved previously for some parts applications. Rather than accept this attractive local source, the Japanese parent directed their Japanese supplier—which had limited production in the U.S. devoted to independent aftermarket sales—to begin supplying the sales organization's service needs from their U.S. facilities at prices competitive with the U.S. supplier.

Keiretsu's ultimate captives are the consumers who must pay the price for the one supplier, one sales and service outlet regime. Absent competition, Japanese-made parts cost more at home and Japanese consumers clearly are subsidizing aggressive pricing in the hot battle for U.S. market share.

We look forward, certainly, to working with this Committee and others in any way we can to ensure our American producers, workers, and consumers the continued benefits of a competitive market-

place here and the attainment of reciprocal access to Japan and other markets.

Senator BRYAN. Mr. Morris, I thank you for your testimony.

Each one of you has made a rather persuasive, and in my view a compelling, argument that you, in particular, and American industry in general has been victimized by anti-competitive practices which, if occurring here at home, would clearly be actionable. The Department of Justice and the Federal Trade Commission would presumably take action.

I think when the history of our time is written, people will be absolutely incredulous that we have allowed this to occur to ourselves, to our industry, and to our future. I would hope that there are those here from the Federal Trade Commission and the Department of Justice who heard this testimony today. I think many of us in the Congress in a bipartisan way are anxious to work with this industry, not just in terms of your individual companies but the broader issue, and that is how to protect America's industrial base and to make sure that you are treated fairly.

Mr. Pickens, let me begin with you. You and I have not always agreed, but I find it hard to disagree with your premise that clearly, as you point out in your prepared testimony, there are a number of Japanese who serve as members of the boards of directors of American companies. Seemingly there is not a reciprocal benefit accorded to American industry. What do you think we ought to do about it?

Mr. PICKENS. I am sincere in wanting to obtain board seats at Koito. I have held the stock for 17 months. There are no hostile actions on my part, yet Koito continues to accuse me of greenmail. I signed an affidavit and gave it to Takao Matsuura at Koito, saying I am not interested in greenmail. I also am not interested in selling my stock. I simply asked for a chance. I said, "In America, when you ask for a chance, you get a chance, but apparently it is not the same in Japan. Give me a chance to serve on the board, and if I am not a participating board member and I can't help, then I am off in two years." It is that simple. They can vote me off any time they want because they have 60 percent of the stock wrapped up continually. That is another point, if I might, it was an incredible shareholders meeting. I could not believe that a person with 60 percent of the votes would want to take so long to inflict such pain on a group of people that had come all the way from the United States to Japan. There was no reason for it. The meeting could have been conducted in an hour or hour and one-half very easily.

It could have been very polite and orderly. Instead, the chairman continued to lose control of the meeting; constantly asked our people to sit down; said our questions have already been answered, and allowed the Japanese shareholders to make two and three minute speeches when they were at the microphone. Matsuura smiled at the Japanese when they finished, but frown at the Americans and called us foreigners.

I have conducted shareholders meetings in public companies since 1964, and I have never had a meeting that got out of hand. Someone in our group took a tape recorder into the meeting and recorded it. That is what is in this document here. When you ask,

"What can you do," I think that the legislation that is being sponsored now must focus on reciprocity. We must stop what is going on and what we are allowing the Japanese to do because we are going to pay for this in the future. We cannot let the Keiretsu system be exported to the United States. In Fortune Magazine, you may have read the article about the BMW and Mercedes engineers taking the Lexus car, Toyota's fine passenger car, apart and looking at it, piece by piece.

A comment was made by one of the engineers that the Japanese could not sell this car and make a profit on it for $40,000. Now what will happen to that particular segment of the automobile industry is it will not be able to compete at some point because of the tactics of Toyota, and they gain market share. Look at the market share they have gained on us in just the last 20 years.

Senator BRYAN. I might add parenthetically, they do not sell the Lexus in Europe and elsewhere outside the United States at the same price that they sell it here.

Mr. PICKENS. That is right. I have forgotten which Toyota car you can buy in Peoria for $15,000 and pay $22,000 for it in Japan. The Japanese middle class is buying market share. I do not think they want to do, but the elitists in Japan make it the system. And, it has been very, very effective.

Senator BRYAN. Mr. Pickens, I think we are all familiar, and I think many of us are sympathetic, with your situation in terms of gaining access to the board, and your concept of reciprocity is one which I do not have any difficulty with. Putting your own personal situation aside for a moment, give us a little broader view, if you will.

Is the difficulty that you face, the obstacles to your own membership on the Board of Directors, is it your view that that is a widespread practice or are you being singled out?

Mr. PICKENS. I am disappointed to see American firms—Wasserstein, Perella & Co., our own former commerce secretary. Pete Peterson and Kext & Company from New York being hired by Toyota to attack me. They go back to the 1980's when I did try to take over Phillips Petroleum and Unocal. They bring that up and try to discredit me, saying I am not a person who could serve on the boards of any of those companies. That is ridiculous. I never asked for a board seat at Phillips or Unocal.

So, I do think I am being singled out in this case, but on the other hand, there is nobody else serving on these boards either.

Senator BRYAN. You are suggesting it is a broad practice that exists in Japan? Access to membership on the boards of directors, even when one holds as substantial an interest as you do, 26 percent, as I recall, is generally denied to Americans? Would you say that practice is pervasive? Putting your own situation aside for the moment, what information can you share with the Commission?

Mr. PICKENS. Seventeen months ago, I bought 26 percent of a Japanese company and I asked for representation on a board of 20 people. What could I do to damage them on a board of 20 people? Not much. All they have to do is talk fast, vote quickly and I would not even know what has been said. So there is nothing I can do. I began to wonder why not?

Well, if you look at the Toyota bylaws of a few years ago, they stated only a Japanese person could serve on a Toyota board. They finally revised that. So, why is it they do not want me on the board? They do not want an American to be on a Japanese board in a keiretsu family and be able to see everything on the inside.

I thought Koito management would be delighted to have me there because I could be the one who pointed out that we are entitled to better margins on our products with Toyota. I could be the one who asked tough questions. The Koito management is totally dominated by Toyota, so my assumptions were wrong.

Senator BRYAN. We thank you for your testimony. Let me ask Mr. Dunlap, how are we doing with the new technology, the dual stacking, is it, is that what the concept is in this VCR that you are developing?

Mr. DUNLAP. It is dual-deck, side-by-side technology that allows the user to make high quality copies of tapes, it allows you to edit your home movies and record two TV shows at the same time. It is very simple to operate.

The simplicity of the VCR-2* is proof to the American consumer that innovation is out there that has not been available before. A lot has been said today about dumping and how it benefits the consumer. It only benefits the consumer in the short run. For one thing, it eliminates competition. Secondly, it eliminates freedom of choice.

Most Americans today have had to put up with the flashing of the 12:00 o'clock on their VCR because they do not know how to shut it off. Why hasn't this been solved by the Japanese manufacturers during the past 15 years?

Our company is coming forward with products that are easy to understand, easy to use and——

Senator BRYAN. This may be a tremendous marketing opportunity, if you want, for you right here, Mr. Dunlap. I think everybody is kind of on the edge of his or her seat. We all know what you are talking about.

Mr. DUNLAP. One of the things that is important about the Go-Video litigation is that we received a ruling from the Ninth Circuit that allows other American businesses that have been the victims of cartels, Japanese cartels and foreign cartels, to bring suit against those cartels in American Federal courts and go over to the foreign countries, like we did, take depositions and bring that evidence back for trial here in the U.S. courts.

There was also another point that came up earlier today about the *Matsushita* case.

Senator BRYAN. Can I interrupt you just for a second? Hold your point. A couple of questions that I think would be helpful for us to know. How are you doing, are you marketing your product now? You are in the marketplace?

Mr. DUNLAP. Yes. Fortunately, a Korean company, Samsung, agreed to manufacture the product for us. And we are proud to announce that we also have American component parts in this product. It is the first time that any major American component parts have been in a VCR. Intel Corporation of Chandler, AZ, produces the microcontroller that permits the VCR-2* to perform the unique functions that it does.

Senator BRYAN. The second question, Mr. Dunlap, how are you doing on your lawsuit? Where are you with that?

Mr. DUNLAP. The lawsuit is still pending. We had to file a second suit because discovery was cut off in 1987 and our attorneys discovered that the Cartel system went deeper than just dual-deck VCR's, that it covers VCR's, digital audiotape, high density television and other consumer products under the control of the Japanese cartel. So we filed a second suit which is pending and awaiting discovery now.

Senator BRYAN. It is my understanding that you have filed suit as an individual, or as a corporation, however you are organized.

Prior to filing that suit what conversations, if any, did you have with the Federal Trade Commission or the Department of Justice? Did you suggest to the law enforcement agencies that this practice that we are confronting is insidious, it violates antitrust laws, we ought not to have to put up with it, we would like to have the government protecting an American market and a level playing field?

Mr. DUNLAP. We have met with and had many discussions and many conversations with both the Department of Justice and the Federal Trade Commission and, in fact—even though the evidence in our case is under a protective order and that means that not even I have access to that evidence, only our lawyers have access to it, even in spite of that—we turned that evidence over under a subpoena to the Department of Justice. To date we have no indication that any action is going to be taken.

So at this point, we do not know what they are doing with it.

Senator BRYAN. I suppose hope springs eternal, Mr. Dunlap. We hope that you will hear from them in your lifetime.

You were about to make a point and I rudely interrupted. Let me give you an opportunity to make that point before I ask Mr. Morris a couple of questions.

Mr. DUNLAP. Thank you. I think it is an important point and it has to do with the *Matsushita* case. There is a lot of concern in the legal community, as I understand it, about the *Matsushita* case. And I think one of the major problems with that case, as I have heard, is that the courts started to act as a 13th juror in that case and are not letting these antitrust cases go to the jury system and are not letting juries of our peers make decisions on whether, in fact, there are antitrust violations. Fortunately, about ten days ago the Ninth Circuit Court of Appeals came down with a ruling that I understand, and have been told, severely limits and changes the holding of the *Matsushita* case. I believe it is hope for other companies to be able to bring antitrust actions.

Senator BRYAN. Mr. Dunlap, we thank you for your testimony and congratulate you on your company's success and wish you continued success.

Mr. DUNLAP. Thank you.

Senator BRYAN. Mr. Morris, turning to you for a moment, what success have you had representing a broad-based trade association in getting the Department of Justice and the Federal Trade Commission somewhat energized? The numbers you recite are pretty impressive—less than 1 percent U.S. penetration of Japan's 65 billion dollar plus auto markets. I should think that ought to invite at least some preliminary concern on behalf of our Federal agencies

that are responsible for enforcing our antitrust laws. The Japanese control 50 percent of the content of all cars sold in America, and 23,000 net U.S. supplier jobs were lost in 1988 alone.

It seems to me there is a public policy interest there that ought to be pursued on a broad base by those who are charged with the responsibility of enforcing America's antitrust laws.

You strike me as a pretty articulate man, Mr. Morris. Tell us what your success, if any, has been.

Mr. MORRIS. Senator Bryan, thank you for the compliment. I am also a particularly frustrated man because most of the effort that has been expended by our association has been unsuccessful. As far as existing legislation is concerned and the antitrust laws, as you know, the 1988 trade law brings foreign anticompetitive practices within the USTR's reach and it holds foreign governments accountable, if foreign governments, indeed, tolerate the sort of practices you have heard described here today.

And we were among those that were strongly encouraging Ambassador Hills to have Japan placed on the USTR's priority list.

Senator BRYAN. You are talking about the 301 list?

Mr. MORRIS. Yes, I am.

Senator BRYAN. May I take it, Mr. Morris, without rudely interrupting, by implication you seem to have abandoned hope that there is going to be any voice that is listening to you in terms of antitrust enforcement. You are recognizing that the trade provisions of the 1988 act may be of help to you. I am taking it from your testimony that maybe you have given up, and that you are going to have to rely upon the trade sanctions as opposed to the antitrust remedies.

Mr. MORRIS. We will never give up. So as far as my lifetime is concerned, that may be shorter than you think; certainly if this continues.

Senator BRYAN. Maybe it will happen in this century at least.

Mr. MORRIS. Okay. But we are going to rethink our priorities, or at least our strategy to developing policy at the congressional and administration level that assures U.S. parts makers fair commercial consideration. Current policies, including the market opening sector specific cross talks, the SII initiative and so forth, have not produced any significant results thus far.

While we are always hopeful and we will always be here to work with you in advancing our cause, we feel that there is a public battle here to be fought as well. As you know, the Japanese have been successful in engaging some of the best PR talent here in town as well, so that they are able to articulate their case in the media and elsewhere to where we are running second best there, too. We feel our story is better, but we lack all those resources in order to engage that talent. However, we are not giving up on the policy front or on the PR front.

But I do think that it is important that with respect to what the public knows about this entire situation, that we do a great deal more by way of getting information out about these situations. With all due respect, Senator, today's testimony, my own included, as long as it remains in the confines of hearing rooms, has limited impact.

Senator BRYAN. I appreciate your comment and I wish you well, Mr. Morris. Let me yield now to my colleague, Senator Gorton.

Senator GORTON. Mr. Pickens, have you asked for and have you received any encouragement, help or guidance from any agency of the government of the United States, either here or through the embassy in Tokyo in connection with your struggle for corporate justice from Koito?

Mr. PICKENS. I have not had any agency or really anybody in the government discourage me. I believe you know I am not looking for somebody to bail me out. I do think this situation with Koito is worthy of Congress watching closely. I have not asked for any help until just recently. After 17 months, I am about ready to ask for a little help.

Senator GORTON. What kind of help are you going to ask for?

Mr. PICKENS. My request is so simple. It is representation and give me a chance. It is real easy for somebody in the Administration to say "Hey, look, give the guy a chance. He has made a big investment. He wants to serve on the board. Give him a chance to serve."

I would like that kind of help, but I have not had anybody offer. On the other hand, I have not felt that anybody was working against me, either in the Administration or Congress. Senator Bryan said that we do not always agree. I probably have come over more to Senator Bryan's position than he has to mine as time has passed.

Senator BRYAN. I agree with you on this point, Mr. Pickens.

Mr. PICKENS. The point is, in America we do not always agree. Over time things change and we get a better feel for it. The heat goes off the subject and we can analyze it in a cooler situation. On the subject today—Terry's and Julian's business and what I am involved in—let me tell you, we have 95 percent in this country who are with us. I will just give you an example.

I am getting in the car at the Madison a few minutes ago to come over here. A guy I never saw in my life runs to the curb and said, "Go get them, go get them." I get that every place. I am not kidding you. You would absolutely be amazed at the mail I get on this subject.

When I thought about running for governor of Texas, I made a speech in Texas attended by 450 people in a high school gymnasium. When I got through, no one asked me about education in Texas and what I was going to do about it; they did not ask me about crime; they asked me about Japan. The first seven questions from the audience did not even relate to Texas as a gubernatorial candidate, and the interest in Japan was amazing. It may have been telling me they were not interested in me as governor, but nonetheless, I am. This subject is one that people are very focused on in this country.

Senator GORTON. You mentioned in passing when you were encouraging a change in our attitudes here, that we ought to be guided in our relationships with Japan by principles of reciprocity. Perhaps you will enlighten us a little bit on what specifically you mean by reciprocity.

Do you mean that we should consciously establish policies that make it as difficult for Japanese to join American boards of direc-

tors as Koito has to you? Do you mean that we should make it as difficult for Japanese corporations to operate in the United States, to get permits and the like, as Japan does American corporations in Japan? Do you mean that we should impose some kind of reciprocal trade barriers which are removed only as business opportunities there grow? What do you mean by reciprocity?

Mr. PICKENS. If we let their keiretsu system be exported to the U.S., they will have a great deal to say about what goes on. We must shut it off before it gets started.

Somebody asked me where I would start. I would start with the U.S.-Canadian trade agreement. I would put it on the table and say: "We are going to get something worked out here, and I do not see why it should take over 60 or 90 days. Although this is not an agreement between us, it is a place to start. I would try to start with something that has already been established, and I would go through the laundry list you just gave me. I would finally get down to a point where we could get the same opportunities in Japan.

I would tell the Japanese that we are going to open up. Akio Morita with Sony says our products would not sell in Japan because American products, are inferior. That is the weakest of all arguments from their side. If that is the case, so be it. Let our products go to Japan and die on the shelf. I never have found a time when Americans could not compete with anybody else in the world if given a level playing field. Give Americans a chance and we will show just what we can do.

Finally, if I negotiated with the Japanese, I would say, "We are either going to open up or shut you off, because we are not going to sit here like fools. If Governor Clements told Governor Belmon he was going to continue selling Texas products in Oklahoma, but Oklahoma could not sell anything in Texas, I can imagine how far that would go. It would be an outrage.

It all comes down to one thing: Give Americans the same deal as the Japanese. I think Congress should use the FTC and its investigative power because they are going to have to dig. This is not stuff you find on the top of people's desks. This is a well-designed plan that is working in their direction and against us.

Senator GORTON. Thank you. Mr. Dunlap, what kind of obstacles did the Japanese manufacturers throw in your way during the course of this seven years? Manufacturing, technological, marketing? I do not mean to go through every detail, but what were the practical handicaps you were placed under?

Mr. DUNLAP. Well, the Japanese literally stole the underlying technology from America, took it back to Japan and then together pooled all of the patents and all of the technology and ultimately control all of the component supplies.

In spite of the fact that we originally had an OEM agreement, a manufacturing agreement with NEC in 1985, the companies got together after that agreement was reached and decided through a "voluntary restraint agreement," that no dual-deck VCR's are going to be manufactured, no component parts are going to be supplied for the manufacture of dual-deck VCRs and no one is going to enter a licensing agreement for manufacturing of dual-deck VCR's because they knew Go-Video held the patent. So every time for the next two, three years, every place we went to talk to manufactur-

ers, whether it was in Japan or outside of Japan, the answer was always the same: We cannot do it because the Japanese control the supply of component parts.

Senator GORTON. You could not get your product manufactured, is that what you are saying?

Mr. DUNLAP. That is correct.

Senator GORTON. And there were no competent manufacturers in the United States to whom you could go?

Mr. DUNLAP. The closest we can come to a competent manufacturer in the United States in consumer electronics is Zenith. Zenith makes a few television sets; most of those I understand are manufactured and assembled in Mexico, and Zenith buys all of their VCR's from JVC. My opinion is that Zenith was afraid to do anything. I had many meetings with Zenith. I told them that this is an opportunity for Zenith to help bring back American manufacturing, but apparently they are afraid to do anything. That is pretty much the case around the world.

There is a fear out there that if they begin to do business in contradiction to what the Japanese cartels have laid down as law, they will get cut off in their supplies and they will get cut off in their business in other ways.

Senator GORTON. So for your assembly and most of your parts, you have to go to a very large and presumably competitive Korean company?

Mr. DUNLAP. Yes. Fortunately, Samsung, about a $28 billion company, has become somewhat autonomous from Japan through their willingness to stand up to the Japanese cartels and do it on their own and that is what we need to do here in the United States. It is difficult for small companies, innovative companies, companies with new products in the United States to get venture capital to even go up against these cartels. So it is very tough.

Senator GORTON. Thank you.

Senator BRYAN. Gentlemen, we thank you very much for your testimony. Mr. Morris, I was struck by the fact that your comment that if the only thing that occurs as a consequence of these hearings are that the words bounce back and forth within this chamber, we have not accomplished too much. Hopefully this message will be carried beyond the chamber and the American public will understand what is involved here and we wish all of you well in your respective enterprises.

Mr. MORRIS. Thank you very much.

Mr. PICKENS. Mr. Chairman, could I make the transcript of the Koito annual meeting on June 28th a part of this?

Senator BRYAN. Indeed you can, Mr. Pickens. And that transcript will be made a part of the record of these proceedings by reference.[1]

Gentlemen, we thank you for your testimony. Our final panel this morning consists of Mr. Stanley E. Huffman, who is the chief executive officer of S.E. Huffman Corporation, and Mr. Brian Turner, the executive assistant to the president of the Industrial

[1] The transcript was not reproducible and was retained in the subcommittee files.

Union Department of AFL–CIO on behalf of the labor and Industry Coalition for International Trade.

Gentlemen, welcome to the table. We would ask those who have conversations to please carry them on outside the hearing room.

Mr. Huffman, we will begin this panel with your testimony, sir.

STATEMENT OF STANLEY E. HUFFMAN, CHAIRMAN, S. E. HUFFMAN CORP.

Mr. HUFFMAN. Thank you, Senator Bryan. It certainly is a pleasure to be here as one of the 300 members of the National Machine Tool Builders representing their point of view. I have been very much aware of unfair trade practices for a number of years. This is a subject close to my heart. So I am particularly happy that I have been asked to attend.

Senator BRYAN. We are delighted to have you here.

Mr. HUFFMAN. The United States machine tool industry has been a victim of unfair trading practices by Japan and other foreign governments. One such practice is the topic of this hearing today, government sanctioned cartels.

These cartels are used in combination with other anti-competitive practices to distort worldwide competition in a specific industrial sector.

A serious threat to the U.S. national security is posed when basic and defense-sensitive industries, such as ours in the machine tool industry, are, in effect, targeted out of business.

As a result of foreign direct investment, foreign companies now own more than 12 percent of America's manufacturing base. Discussions with other NMTBA members indicate that the vast majority of us have been entirely frozen out of doing business with these transplants, particularly with the Japanese transplants.

The United States Government should be concerned by evidence that Japanese or other firms systematically discriminate against U.S. firms in the procurement of capital equipment.

Two of our members can attest to the fact that the problem extends to joint ventures between the U.S. and Japanese companies as well. In two separate instances, the same joint venture placed orders with two American companies which were abruptly canceled by the Japanese. The contracts ultimately went to Japanese suppliers.

And I can say that there are three companies now, because just in the last three weeks our company was discriminated against. In Detroit, a joint venture company was to select our equipment. The American leader of this company selected our equipment because it was lower cost, higher tech and was proven. But when he went to buy this equipment, he was told by the Japanese: "You must buy Japanese," and he bought six inferior Japanese products.

As the Japanese transplants freeze out American businesses in the U.S., Japan continues to close its markets not only to American products but to machine tool companies all over the world.

This September at the NMTBA's International Machine Tool Show in Chicago, the Department of Commerce and MITI of Japan will put their machine tool cooperation program into effect. This program is aimed at combatting the problems I have described.

We would value the opportunity, Senator, to keep this and other Committees of Congress informed of this program's progress as events unfold.

In 1982 Houdaille, an NMTBA member which has since gone out of business, submitted a petition to President Reagan seeking retaliation against Japanese unfair trade practices. Through persistent investigation here, and particularly in Japan, Houdaille was able to document policies and practices employed by the government of Japan to skew world machine tool competition in favor of Japanese manufacturers.

However, the President refused to take any action. Houdaille was subsequently forced to close two plants and to sell its four remaining machine tool operations, resulting in the loss of approximately 2,200 jobs. Houdaille was not the only machine tool company to suffer as a result of unfair targeting.

The entire American machine tool industry was held hostage by the Japanese, because there was no provision under U.S. trade laws that offered a remedy to victims of foreign export targeting.

In 1988 Congress finally recognized the destructive impact wrought by targeting in such industries as machine tools, steel, and semiconductors when it made targeting an actionable unfair trade offense under Section 301 of the omnibus Trade Act.

Today, I am distressed by the possibility that Section 301 could be bargained away during final negotiations in Geneva. My written statement quotes Administration officials involved in the negotiations stating that this possibility exists.

United States trade laws must be kept intact. The alternative is to allow domestic industry to suffer irreparable harm and loss of competitiveness and to allow foreign governments to determine the structure of America's industrial base. The threat to military and economic security is frightening.

I ask that the members of this Subcommittee urge President Bush to preserve America's laws against unfair trade during the Geneva conference and signal your intent to oppose the agreement if those laws are placed on the auction block.

Thank you very much.

[The statement follows:]

STATEMENT BY
STANLEY E. HUFFMAN
CHAIRMAN
S. E. HUFFMAN CORPORATION
APPEARING ON BEHALF OF
NMTBA - THE ASSOCIATION FOR MANUFACTURING TECHNOLOGY
BEFORE THE
COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION
SUBCOMMITTEE ON CONSUMER
UNITED STATES SENATE
JULY 19, 1990

I. INTRODUCTION

Good morning, my name is Stanley E. Huffman. I am Chairman of S. E. Huffman Corporation in Clover, South Carolina. I am also Secretary of NMTBA - The Association For Manufacturing Technology and a member of its Board of Directors. Accompanying me is James H. Mack, NMTBA's Vice President of Government Relations.

NMTBA is a trade association whose membership includes over 300 machine tool building firms with over 400 locations. America's machine tool industry builds and provides to a wide range of industries the tools of manufacturing technology including cutting, grinding and forming machines, universal measuring machines, and automated manufacturing systems.

We appreciate the opportunity to address this Subcommittee on the importance of strong U.S. trade laws in maintaining American competitiveness in the face of unfair foreign trade practices.

II. THE STATUS OF THE MACHINE TOOL INDUSTRY

Although America's machine tool industry is relatively small by some corporate standards, it accounts for a very basic and strategic segment of the nation's industrial capacity. Not only does our industry build the machines essential to our military readiness and our ability to respond quickly and effectively in the event of a national emergency, but it also builds the product which

underlies virtually every other commercial product. Machine tools are the very essence of the industrial manufacturing process. They are the "tools of production."

A struggling machine tool industry is a threat to the stability of the United States' industrial base. It truly jeopardizes national security. Unfortunately, for varied reasons including unfair foreign trading practices, the industry is struggling. In fact, imports represent approximately 50 percent of the value of machine tools consumed in the U.S. today.

In 1983, NMTBA filed a request for temporary import relief under Section 232 of the Trade Expansion Act of 1962. Chairman Hollings and Senator Danforth strongly supported our petition. In 1986, President Reagan finally recognized the danger presented to our national security by dependence upon foreign sources for machine tools and announced his decision to seek Voluntary Restraint Agreements (VRAs) on certain machine tool imports as part of his Machine Tool Domestic Action Plan. VRAs on six classes of machine tools were negotiated with Japan and Taiwan (the principal suppliers of U.S. imports of these machines), and other countries were put on notice not to increase their exports to the United States.

However, limiting imports alone won't save our industry. Our industry is working hard to take advantage of the breathing space provided by the VRAs to restore its competitiveness, but it needs more time and more financial help if it is to succeed.

The United States machine tool industry has been the victim of unfair trading practices by Japan and other foreign governments. One such practice is the topic of this hearing today -- government-

sanctioned cartels. These cartels are used in combination with other anti-competitive practices, including home market protection, research and development subsidies, concessionary loans, special tax benefits, and restrictions on technology transfer to distort worldwide competition in a specific industrial sector. These practices, commonly known as industrial targeting, pose severe competitive problems for U.S. companies, whose products may be excluded from protected home markets, unfairly displaced from third country markets and must compete here at home with unfairly subsidized imports. A serious threat to U.S. national security is posed when basic and defense-sensitive industries, such as the machine tool industry, are, in effect, targeted out of business.

In addition to industrial targeting, our industry has been seriously hampered by the failure of our government to provide export promotion and financing anywhere near that which is provided by the governments of our major industrial competitors.

At the same time, our government has actually impeded the competitiveness of ours and other industries through the cumbersome and time-consuming interagency export control process. The United States and its allies are supposed to abide by a common export control regime known as COCOM. But, up until this year, the COCOM list for machine tools had not been effectively revised for 16 years, and our allies figured out a myriad of ways to get around the outdated rules. The most extreme example of this was the infamous Toshiba case, but there are countless others. Our own government insisted on a rigid adherence to and strict interpretation of the outdated rules, resulting in the U.S. machine tool industry

exporting only $1.3 million to the Soviet Union in 1988, while Germany and Japan exported over $600 million.

In early June, the United States and its COCOM allies agreed on a new shorter list of machine tools subject to export controls. Further streamlining is expected later in the year. Hopefully, our COCOM allies will now join the United States in rigorously enforcing a list of truly strategic products. Later this month, the Senate will have an opportunity to reform the cumbersome interagency process by which our own government interprets and enforces the COCOM list.

We strongly urge that you provide significant reform of that system during your consideration on the Senate floor and in conference of the Export Administration Act reauthorization.

Finally, at the expense of bringing up a controversial subject, I want to commend the substantial majority of the members of the Commerce Committee for their support of the Product Liability Reform Bill (S. 1400); and I want to commend you, Mr. Chairman, for providing fair and balanced hearings on the matter and for putting aside your own personal reservations on this legislation to permit the Committee and the Senate to work its will.

III. **TRANSPLANTS**

Foreign direct investment has increased dramatically in the last ten years; from $83 billion in 1980 to over $400 billion in 1989. As a result, foreign companies now own more than 12 percent of America's manufacturing base.

Although foreign investment has the potential to increase our economic growth and productivity, there is some concern that the

behavior of foreign firms operating in the United States differs from that of domestic firms in ways that are not in our economic interests. Japanese foreign direct investment in manufacturing has attracted attention because of the tightly-knit relationships of their industrial groups known as keiretsu. The United States government should be concerned by evidence that Japanese or other firms systematically discriminate against U.S. firms in the procurement of capital equipment or components.

Discussions with NMTBA members indicate that the vast majority of them have been entirely frozen out of doing business with the Japanese transplants. Most of those that have been invited to bid on contracts have lost them to Japanese suppliers. These members came away from the process feeling that the invitations were not serious in the first place and were merely a way for the Japanese to obtain information on American companies. The few members who have been successful at getting through the transplants' doors have been awarded only crumbs from a large pie. The bulk of the contracts tend to go to Japanese suppliers.

Two of our members can attest to the fact that the problem extends to joint ventures between U.S. and Japanese companies as well. In two separate instances, the same joint venture placed orders with two NMTBA members. One of the companies received an order for forty boring machines. The other received an order for one special machine, quoted on six others, and was led to believe that there would be future orders over the next five years. The Japanese abruptly cancelled both orders, and the contracts went to Japanese suppliers. In the case of the boring machines, the Japanese machines were not even tried out first.

As the Japanese transplants freeze out American businesses in the U.S., Japan continues to close its markets not only to American products, but to machine tools from all over the world. According to the February 1990 American Machinist, Japan imported a total of only $481 million worth of machine tools in 1989 compared to United States machine tool imports of $2.4 billion, West Germany of $1.4 billion, and France of $1.1 billion.

This September, at NMTBA's International Machine Tool Show, the Department of Commerce and the Japanese Ministry of International Trade and Industry (MITI) will initiate their Machine Tool Cooperation Program. This program is aimed at combatting the problems described above. Conferences will address Japanese procurement of U.S. machine tools with some emphasis on procurement by Japanese transplants. The procurement conference will be an effort to match up Japanese users with American equipment manufacturers. NMTBA will be the leading association on the U.S. side with the National Tooling and Machining Association, the American Machine Tool Distributors' Association, and the Foundrymen's Society also participating. The program will hopefully be a step toward opening the doors of the transplants to our industry and breaking down the barriers to business opportunities in Japan. Both NMTBA and the Department of Commerce will be closely monitoring individual results of this program to assure that it yields tangible benefits for the U.S. machine tool industry. We would value the opportunity to keep this and other Committees of the Congress informed of this program's progress as events unfold.

IV. THE HOUDAILLE CASE

In 1982, Houdaille, another NMTBA member which has since gone out of business, submitted a petition to President Reagan

seeking retaliation against Japanese unfair trade practices. For the first time, the Administration was asked to examine the consequences to the United States of Japanese anti-competitive practices. Through persistent investigation here, and especially in Japan, Houdaille was able to document policies and practices employed by the government of Japan to skew world machine tool competition in favor of Japanese manufacturers.

It found, for example, that Japan instigated the formation of a Japanese machine tool cartel and nurtured that cartel under a series of three special laws for the promotion of the machinery industry. In enacting these laws, the government of Japan launched an ambitious crusade to seize the higher value-added and most technologically advanced market segment of this fundamental industry.

MITI used the free hand given to it by these laws to weed out manufacturers with small market shares. Each firm whose production constituted less than five percent of the Japanese market in a specific machine tool and less than 20 percent of the company's total earnings was directed to stop manufacturing those tools. The market shares thereby relinquished were turned over to a limited number of larger, more successful producers. Under MITI's guidance, these companies then exploited the consequent economies of scale and specialization to penetrate export markets, secure in the knowledge that these advantages would be protected against competitive erosion in the Japanese market.

In taking these actions, the government of Japan catapulted its cartel into the high technology end of the market. MITI successfully pressed the Japanese machine tool manufacturers to act

jointly to concentrate their efforts in developing and producing NC machine tools. Each company in the cartel was directed by MITI to increase to 50 percent the NC share of its total production of machine tools. In addition, the cartel was directed to expand its collaborative efforts to include suppliers, customers, service, and other activities.

With the long-range goal of selectively penetrating and dominating important export markets, such as the United States, as its guiding principle, the government of Japan devised imaginative strategies for financing this cartel with tax advantages, concessionary loans, research grants, and other direct and indirect subsidies. In the most unusual example, nearly a billion dollars a year worth of yen, some of which was generated by wagering on bicycle and motorcycle races in Japan, were made available to the Japanese machine tool industry, including the machine tool cartel, and the export of these products. No one has ever challenged the veracity of those findings.

However, the President refused to take any action (reportedly after the personal intervention of Prime Minister Nakasone). Houdaille was subsequently forced to close two plants and to sell two of its four remaining machine tool operations, resulting in the loss of approximately 2,200 jobs. Houdaille was not the only machine tool company to suffer as a result of unfair targeting. Many companies had to close plants, and thousands of jobs were lost. Some firms were forced out of business. The entire American machine tool industry was held hostage by the Japanese, because there was no provision under U.S. trade laws that offered a remedy to victims of foreign export targeting.

V. THE IMPORTANCE OF SECTION 301

In 1988, Congress finally recognized the destructive impact wrought by targeting in such industries as machine tools, steel, and semiconductors when it made targeting an actionable unfair trade offense under Section 301 of the Omnibus Trade Act. This sent a clear message to foreign governments that anti-competitive practices will not be tolerated, and that if such practices occur, action will be taken by the President to stop them.

I would like to take this opportunity to thank Chairman Hollings for his leadership in circulating a letter throughout the Senate which urged the President to stand firm on anti-dumping laws during the Uruguay Round. Now we are faced with another problem. Today, I am distressed by the possibility that U.S. trade laws imposing penalties for unfair trade practices, including the formation of government-sanctioned cartels, could be bargained away during final negotiations in the Uruguay Round.

A March 2nd Inside U.S. Trade article reported that "a high-level European Community official told an American audience late last week that changes in the section 301 trade law are an 'indispensable' element of a final Uruguay Round agreement that the EC would consider successful. Such changes would be a small price to pay for a more open and well functioning trade system, according to Frans Andriessen, the EC's Commissioner for External Affairs. Existing legislation that is incompatible with the GATT must be modified, and section 301 'clearly' falls into that category, according to Andriessen."

The June 1st issue of the same publication stated that "U.S. Trade Representative Carla Hills told reporters that she would

not rule out scaling back the section 301 if the Uruguay Round agreement warrants it."

Finally, the June 8th Inside U.S. Trade quoted Deputy U.S. Trade Representative Julius Katz as stating "that section 301 'by its nature is a self-liquidating problem.'" The article goes on to say that "Katz said the Bush Administration is not arguing in the Uruguay Round trade talks that the U.S. will under no circumstance give up its use of section 301."

Our nation, with its on-again, off-again trade policy, seems bound and determined to die by its own sword. How else could one describe a nation that is even considering action which is damaging to both national security and economic stability? It makes no sense.

VI. CONCLUSION

It is imperative that the Administration not bargain away America's ability to retaliate against unfair trade practices. United States trade laws must be kept intact. The alternative is to allow domestic industry to suffer irreparable harm and loss of competitiveness and to allow foreign governments to determine the structure of America's industrial base. The threat to military and economic security, under this scenario, is frightening.

I ask that the members of this Subcommittee urge President Bush to preserve America's unfair trade laws during the Uruguay Round and signal your intent to oppose the agreement if those laws are placed on the auction block in Geneva.

Thank you. I would be pleased to respond to your questions.

Senator BRYAN. Thank you, very much, Mr. Huffman. Mr. Turner, we will hear from you now sir.

STATEMENT OF BRIAN TURNER, EXECUTIVE ASSISTANT TO THE PRESIDENT, INDUSTRIAL UNION DEPARTMENT, AFL-CIO, ACCOMPANIED BY THOMAS R. HOWELL, COUNSEL

Mr. TURNER. Thank you Mr. Chairman. I am pleased to be here today representing LICIT. I am accompanied by Thomas R. Howell, our counsel.

LICIT, the Labor-Industry Coalition for International Trade, was formed in 1979 to represent the common interests of American workers and American companies in increased, balanced, and equitable international trade. I think it is a unique coalition of labor and industry and that we do not deal with just one industry or sector. We cover a broad range of the manufacturing economy.

Our membership includes 20 major U.S. manufacturing firms and labor organizations.

We are here today because we are deeply concerned about the erosion of America's industrial and technological leadership. Overall the U.S. has run trade deficits of over $100 billion for each of the last six years, and we are afraid that is going to continue.

Charts 3 and 4 attached to our prepared testimony show pages from two recent Commerce Department studies that vividly illustrate America's growing problems in advanced technology. In electronics, this is chart 3 if I am not mistaken, from 1984 to 1987, the U.S. lost market share in 33 out of 37 segments of the electronics industry.

The other chart, 4, is from the recent report on Critical Technologies from the Commerce Department. It shows the United States was losing badly in four of those critical technologies, losing in another six, holding even in only two and gaining in none whatsoever.

So that is ten losing badly or losing, holding even in two, gaining in none.

Senator BRYAN. Mr. Turner, as I understand it, the source of that information is the Department of Commerce Technology Administration; is that correct?

Mr. TURNER. That is correct, a report published in May on critical technologies.

Senator BRYAN. The point that I seek to emphasize is that this is not a document developed by a trade association or an industry-labor alliance, as you are. This is presumably from an objective department of the Federal Government that reinforces the position you seek to make.

Mr. TURNER. Yes, and a branch of an administration that I would have to say by and large perhaps does not fully recognize the significance of the problems that the country is facing.

LICIT hopes that Congress, this Committee and the Administration recognize the breadth and scope of the challenges facing our country.

Meeting that challenge in our view will require a comprehensive trade and competitiveness strategy, including an effective response to unfair foreign trade practices. And we have just completed now,

about two weeks ago, a study on how these issues are being approached and should be approached in the Uruguay round of trade negotiations, and I will have copies of these given to you and distributed to other members of the Committee.

Senator BRYAN. Fine. If you would like, we will make that a part of the record by reference, Mr. Turner.[1]

Mr. TURNER. That will be fine, sir. For all these reasons, LICIT strongly supports the Commerce Committee's investigation of foreign anti-competitive activities. Japan's anti-competitive and exclusionary practices are a particularly serious problem. Japan does stand out, but it is not just Japan. I want to emphasize this, perhaps going beyond the written statement.

We had, as part of our report on the Uruguay round, an examination of the anti-competitive practices in the EC affecting the heavy electrical equipment industry and I would like to read you just a few sentences from that.

Historically the EC market for heavy electrical equipment has been characterized by close relationships between governments, electrical utilities and electrical manufacturers and by national procurement practices. This is in spite of the government procurement code agreed to in 1979 at the conclusion of the Tokyo round of trade negotiations.

According to a 1988 document from the EC Commission—again this is not a private allegation—these practices have created, and I quote, "a firmly closed vicious circle in which outside firms do not even try to win contracts since to do so would be a waste of resources and impossible for a responsible manager to justify."

This conclusion is borne out by trade statistics. From 1975 to the present, U.S. manufacturers of large power transformers and steam turbine generators did not win a single order from an EC purchaser that had a competing domestic supplier. The United States market, on the other hand, was much more open and foreign manufacturers for large transformers got between 10 and 20 percent of the U.S. market in this period and 10 to 25 percent for steam turbine generators.

Also, I would call to your attention the recent newspaper reports of Korean distributors' reduction in sales of products imported from the United States as part of a concerted effort to reduce the Korean declining trade surplus, which clearly represented collusive behavior on the part of the Korean manufacturers and distributors.

Japan's manufactured goods imports are very, very low, by international standards. Part of this is accounted for by the domination of the Japanese economy by bank-centered industrial groups known as keiretsu, which have been commented on earlier here today.

This industrial structure, along with government policies which permit, and in some instances encourage, import and export cartels and other forms of horizontal and vertical linkages are a primary cause of U.S./Japanese trade problems.

This combination makes the Japanese market very difficult to penetrate. As one prominent Japanese executive put it, and I

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[1] The study was not reproducible and is in the Committee files.

quote, "We buy first within our group, that is the keiretsu, and then within Japan and only as a last resort from foreigners."

I wonder if that alone isn't a kind of anti-competitive practice as a state of mind? Second, these giant industrial groups command vast resources and regularly cross-subsidize and dump to capture U.S. markets.

And I call to your attention as well the famous memo from 1985 that the Hitachi semiconductor division sent to its distributors of a major class of semiconductor memory chips. And I quote, "Win with the 10 percent rule. Find sockets from Advanced Micro Devices and Intel, quote ten percent below their price. If they requote, go 10 percent lower. Don't quit until you win. Twenty-five percent distributor profit margin guaranteed." And this was part of the decimation of the American semiconductor industry by cross-subsidization by the Japanese manufacturers.

If these manufacturers are allowed to dump their products to capture markets, smaller U.S. firms, and as we have seen in the semiconductor industry, larger ones will not be able to survive in those lines of business.

Finally, Japan's keiretsu relationships may take root in American soil with the increase in Japanese foreign direct investment. A study by Mordecai Kreinen found that three-quarters of Japanese firms, this was Japanese owned firms operating in Australia, but it is the best evidence we have on the subject, three-quarters of Japanese firms, and I quote, "never even considered international competitive bids and in most cases they go directly to Japan and buy Japanese equipment, either from the parent company or from its traditional suppliers in Japan."

These anti-competitive or exclusionary business practices have caused problems for the United States in a number of sectors. Let me highlight just a few from the longer list in our prepared remarks.

First, foreign investment. Japan has less than 1 percent of its manufacturing assets owned by foreigners, compared now to 12 percent in the United States and upwards of 20 or 30 percent in most of the countries of Europe. Some analysts believe the Japanese government officials screen acquisitions of American firms to coordinate the bids of Japanese companies. This is now an investment coming into the United States, they have coordinated bidding.

An article in the May issue of "Euro Money" concluded, "The latest game with the Japanese seem to be running rings around the West's open market system is mergers and acquisitions." Their special edge: Secret guidance by government officials. Observers in Tokyo believe the bureaucrats routinely prescreen the action to ensure that Japan's companies do not bid against each other. "That is a breach of antitrust law in the U.S. and elsewhere for it means that the seller probably has to settle for less than he can hope for in a free auction. Secondly, semiconductors, which have been commented on here already this morning and I will be brief, Japan as a result in large part of previous dumping behavior now has 98 percent of the market for leading edge memory chips for megabit DRAMs.

Because microchips are the brains of telecommunications equipment, consumer electronics and computers, the consequences of this continued erosion of the U.S. semiconductor industry are devastating.

I want to quote from Senator Wilson's report that the U.S. dependence on Japanese DRAMs has left American companies vulnerable to, and I would say arguably illegal, strong arm and blackmail efforts, including, and I quote here, several sentences, "offering to sell DRAMs to a U.S. company only if it would transfer a proprietary technology to the Japanese DRAM manufacturer, canceling DRAM shipments to a U.S. company hours after talks terminated on a completely unrelated business arrangement that did not conclude to Japanese satisfaction, and threatening to cut DRAM shipments to a U.S. firm unless it purchased custom computer chips, ASICs, from a Japanese supplier."

Third, the transplants, which have been commented on and the auto parts sector in particular. We will have a major loss of American jobs if the, not only is the production shifted of the final product from American-owned to foreign-owned producers but if the components are imported from abroad as a result of anti-competitive practices. And, fourth, the area of amorphous metals where an American company, Allied-Signal, has a leadership in world technology. They have been shut out of the Japanese market through pressure from a government sponsored 34-member amorphous metal group. They are being pressured to license their technology to the Japanese at unreasonably low terms and the Japanese companies are being pressured by Japanese steel manufacturers to delay, that is the utilities, are being pressured to delay investing in amorphous metal transformers until after the Allied-Signal patents expire in 1993.

What should the United States do about all of this? First and foremost, and it is something that is on the chopping block, as we just said, right now, is to maintain and enforce U.S. trade laws.

The 1988 Trade Act amended Section 301 of the U.S. law to make foreign anti-competitive practices a foreign unfair trade practice, that section needs to be not only maintained but enforced. Secondly, our a[illegible]umping laws can help prevent predatory pricing. The low cost sa[illegible] can drive U.S. suppliers out of the market, resulting in foreign monopoly power.

Unfortunately, a major negotiating objective of our trading partners in Geneva is to weaken these provisions of U.S. law and we continue to receive signals from the Administration that they may just be willing to go along with many of these demands from foreign governments. We hope that not only would our existing law be maintained, but it should be further strengthened as a result of this round and the follow-on implementing legislation that would come before Congress next year.

Secondly, the U.S. should carefully monitor Japan's compliance with commitments made under the structural impediments initiative which includes strengthening the enforcement of their Anti-Monopoly Act and to strengthen the Japan Fair Trade Commission, which has been an absolute pussycat in terms of any enforcement for its entire lifetime, going back to World War II.

Finally, the U.S. should determine whether the FTC and the Department of Justice have adequate resources and legal authority to respond to foreign anti-competitive practices. In LICIT's opinion, the Congress should, if necessary, provide the FTC with additional resources to carry out these responsibilities.

That concludes my oral statement, sir.

[The statement follows.]

STATEMENT OF BRIAN TURNER, EXECUTIVE ASSISTANT TO THE PRESIDENT, INDUSTRIAL UNION DEPARTMENT, AFL-CIO

Mr. Chairman and Members of the Committee: the Labor-Industry Coalition for International Trade (LICIT) is pleased to have the opportunity to testify at this hearing on foreign anticompetitive practices. My name is Brian Turner. I am the Executive Assistant to the President of the Industrial Union Department, AFL-CIO, and I am representing LICIT today.

LICIT was formed in 1979 to represent the common interest of American workers and American firms in increased, balanced and equitable international trade. Our membership includes 20 major U.S. manufacturing firms and labor organizations. A membership list is attached.

AMERICA'S ECONOMIC CHALLENGES

LICIT is very concerned about the erosion of America's industrial and technological leadership. The United States has run trade deficits of over $100 billion for the last six years, and as a result has accumulated a foreign debt of $663.8 billion. The wages of American workers have fallen by 10 percent since 1973. The Commerce Department recently reported that from 1984 to 1987, the United States lost world-wide market share in 33 out of 37 categories of electronics goods. Another Commerce Department study found that out of twelve critical technologies: the United States was losing badly to Japan in four, losing in six, holding in two and gaining in none. And in the latest issue of the Harvard Business Review, industry expert

Charles Ferguson concludes that U.S. information technology companies are in danger of failing outright or becoming "local design and market subsidiaries of Japanese companies that will dominate a $1 trillion world hardware industry."

LICIT hopes that Congress and the Administration recognize the breadth and scope of the economic challenge our country faces. LICIT believes that meeting the challenges posed by the Pacific Rim countries and a newly resurgent Europe will not be possible without a comprehensive trade and competitiveness strategy, including: measures to increase public and private savings; greater domestic investment in plant and equipment, research and development, human resources and infrastructure; and a trade policy which effectively responds to foreign unfair trade practices.

For this reason, LICIT strongly supports the Senate Commerce Committee's investigation of foreign anticompetitive activities. Although addressing foreign unfair trade practices is only part of an overall trade and competitiveness strategy, it is an important part. In our recently released report on the Uruguay Round of multilateral trade talks, LICIT concluded that one of the Round's shortcomings was its failure to address anticompetitive practices.

JAPANESE ANTICOMPETITIVE PRACTICES

Anticompetitive and exclusionary business practices are a particularly serious problem in Japan. There has been a growing recognition in the economics profession that Japan's patterns of trade and investment are unique among advanced industrial countries. Its imports of manufactured goods, levels of inward direct investment, and levels of intra-industry trade are substantially lower than that of its trading partners. To give just one example -- from 1980 to 1988, Japan exported 55 million autos while importing just 600,000. A recent survey conducted by the Department of Commerce and the Ministry of International Trade and Industry revealed further evidence of the closed nature of the Japanese market. Prices of identical goods were, on average, 39 percent higher in Japan than in the United States. The Department of Commerce stated that this was at least partially attributable to "exclusionary business practices" and "the frequent absence in Japan of free, open and competitive markets."

The characteristic of the Japanese economy which has attracted the most attention is its form of industrial organization. The Japanese economy is dominated by six bank-centered industrial groups known as keiretsu, which together account for 17 percent of total sales and 18 percent of profits. These financial keiretsu, composed of banks, insurance companies, trading houses and manufacturing firms, are bound together

through mutual shareholdings, interlocking directorates, exchange of personnel, financial commitments and membership in exclusive management councils. In addition -- large manufacturers may establish their own industrial groups or organize their contractors and sub-contractors through stock-holdings, personnel exchanges and technical assistance.

This industrial structure, combined with government policies which permit (and in some instances, actively encourage) import and export cartels and other forms of horizontal and vertical linkages, is one of the primary causes of U.S.-Japanese trade friction. From the perspective of the United States -- it is a problem for several reasons. First, these business practices make the Japanese market very difficult to penetrate. As one prominent Japanese business executive put it: "We buy first within our group, then within Japan and only as a last resort from foreigners." Second, these industrial groups command vast resources. If they are allowed to dump their products to capture markets, smaller U.S. firms will not be able to survive. Finally, Japan's keiretsu relationships may take root in American soil with the increase in Japanese foreign direct investment. A study by an Mordechai Kreinin, an economist from the University of Michigan of 62 American, European and Japanese subsidiaries found that 20 out of 22 American subsidiaries employed internationally competitive bids for the purchase of machinery, components and materials. By comparison, 17 out of the 20 European firms employed internationally competitive bids -- while

only 5 out of 20 Japanese companies did. Kreinin discovered that most Japanese firms "never even considered" international competitive bids, and that "in most cases they go directly to Japan and buy Japanese equipment, either from the parent company or from its traditional suppliers in Japan."

These anticompetitive or exclusionary business practices have caused problems for the United States in a number of sectors:

Amorphous Metals: For more than ten years, Allied-Signal has attempted to penetrate the Japanese market for amorphous metals, a new material that can dramatically reduce energy loss in electrical devices. According to Allied-Signal, it has been shut out of the market through Japanese obstruction of its efforts to obtain patent protection, pressure from a government-sponsored, 34-member "Amorphous Metal Group" to license its technology to Japanese companies on unreasonable terms, and a concerted refusal by Japanese electric utilities to buy Allied's product. Japanese steel companies are putting pressure on the electric utilities to delay their purchases of amorphous metal transformers until 1993, when Allied-Signal's patents are due to expire, and orders can be filled by Japanese companies.

Auto Parts: The tight-knit relationships between Japanese auto manufacturers and their suppliers have made the Japanese market exceptionally difficult to crack. Last year, U.S. firms exported

$638 million worth of auto parts (one percent of the market), while Japanese firms sold $11 billion in the United States. As Japan's production of autos in the U.S. increases -- there is concern that these *keiretsu* relationships will be recreated. In a 1988 study, the General Accounting Office concluded that the growth of Japanese transplants could cost the United States 45,000 jobs. This would occur because output by American auto companies would decline, and because the Japanese transplants would source a larger percentage of their parts from overseas.

Construction: U.S. participation in the ¥60-80 trillion Japanese construction market is severely restricted by the so-called "dango." This is an informal system for rotating winning bids among Japanese construction firms, especially for public contracts. The national or local government agency involved prepares a list of the firms which are eligible to bid on the project. The construction firms usually get together before the bids are submitted, and determine among themselves which firm will actually get the contract.

Some Japanese government agencies are actively involved in the "dango" system. One Japanese newspaper obtained an internal document of the Ministry of Construction which listed those firms which were "likely" to be awarded specific contracts in the coming fiscal year. The list proved to be accurate in 43 out of 45 instances.

Foreign Investment: Some analysts believe that Japanese government officials screen acquisitions of American firms to coordinate the bids of Japanese companies. An article in the May 1989 issue of Euromoney concluded that:

> The latest game where the Japanese seem to be running rings around the West's open market system is M&A. Their special edge: secret "guidance" by government officials. Observers in Tokyo believe the bureaucrats routinely pre-screen the action to ensure that Japanese companies don't bid against each other. That's a breach of anti-trust law in the US and elsewhere -- for it means that the seller probably has to settle for less than he could hope for in a free auction.

Polysilicon: In 1988, Union Carbide filed a suit in U.S. District Court against seven Japanese manufacturers of polysilicon and silicon wafers, charging that they had formed an illegal cartel to control prices. Polysilicon is used in the production of silicon wafers, which is in turn used in the manufacture of semiconductors.

According to Union Carbide, Japanese manufacturers have met regularly (since at least early 1983) to share supply and demand data on the Japanese and worldwide polysilicon and wafer markets. They also allegedly agreed to set purchase prices, coordinate an increase in polysilicon production above anticipated demand to maintain artificially depressed prices, and restrict imports of polysilicon from non-Japanese sources. Not coincidentally, MITI had formed a "High-Purity Silicon Issues Study Group" with the industry, which recommended a reduction in imports and import

prices. This concerted action has had the effect of driving many U.S. manufacturers out of the business.

Unfortunately, the facts surrounding this case will remain murky. Earlier this year, Komatsu Electronic Materials, one of the alleged cartel members, bought Union Carbide's polysilicon plants. With this purchase, Japanese suppliers increased their share of the world polysilicon market from 30 to 45 percent, while U.S. share dropped from 45 to 30 percent. In addition, Mitsubishi has an unidentified minority interest in one of the two remaining American suppliers.

Soda Ash: Although U.S. soda ash (used in the manufacture of glass) is highly competitive, its access to the Japanese market has been limited by a wide range of anticompetitive activities. Japanese soda ash producers have controlled distribution channels and terminal facilities, pressured Japanese distributors and consumers, and (at least until 1983) established limits on the permissible level of imports. Although the Japan Fair Trade Commission ordered the cartel to stop its activities in 1983, and issued a "warning" in 1987, U.S. producers still believe that their sales in Japan are being regulated by their Japanese producers and their affiliated trading companies. Many Japanese firms which consume soda ash, for example, routinely call their regular Japanese suppliers for "pre-clearance" before buying U.S. soda ash.

Semiconductors: Over the years, Japan's government and industry have employed a number of techniques to establish a dominant position in the global semiconductor industry: a protected home markets, forced technology transfer, subsidized R&D consortia, and dumping. In the last decade, the U.S. share of this market has declined from 60.7 percent to 35 percent, while Japan's share has increased from 26.4 percent to 52 percent.

Japanese dominance of the market for DRAMs (dynamic random access memories) is even more pronounced. Japanese dumping of DRAMs in 1985 and 1986 drove all but two U.S. firms out of the business. Japan now has 98 percent of the market for leading-edge (4-Megabit) DRAMs. Because microchips are the "brains" of telecommunications equipment, consumer electronics and computers, the consequences of the continued erosion of the U.S. semiconductor industry are devastating. According to the National Advisory Committee on Semiconductors, Asian suppliers may dominate "the U.S. downstream industry and ultimately the global electronics landscape" if current trends continue.

This is not a theoretical concern. In 1988, Senator Pete Wilson received reports that U.S. dependence on Japanese DRAMs left American companies vulnerable to "strong-arm and blackmail efforts", including:

> "** Offering to sell DRAMs to a U.S. company only if it would transfer proprietary technology to the Japanese DRAM manufacturer;

** Cancelling DRAM shipments to a U.S. company hours after talks terminated on a completely unrelated business arrangement that did not conclude as the Japanese firm desired;

** Threatening to cut DRAM shipments to a U.S. firm unless it purchased custom computer chips (ASICs) from a Japanese supplier."

Steel: Although Japan's steel market is not protected by any visible barriers, steel manufacturers use their influence over the distribution system and their customers to limit imports. In a May 5, 1990 article, the Japan Economic Journal reported that three employees of a trading company were abruptly transferred to other sections of the company for importing steel without the approval of Japanese manufacturers. In the early 1980s, Japanese firms who wished to import cheaper steel from Korea and other countries felt compelled to do so covertly. They brought the steel in at night, eliminated the imprints of the producing country, and loaded it on to unmarked trucks -- all in an effort to escape the retribution of Japanese steel manufacturers.

WHAT SHOULD THE UNITED STATES DO?

Dealing with foreign anticompetitive practices will not be easy. They are difficult to document and do not fit neatly into the jurisdictions of either the FTC or the U.S. Trade Representative. Extraterritorial application of our antitrust laws would undoubtedly pose legal problems. In addition, our antitrust laws were designed to protect consumer interests rather than producers. Nevertheless, there are a number of steps that LICIT believes would be helpful:

1. **Maintain U.S. trade laws:** The 1988 Trade Act amended Section 301 to make foreign anticompetitive activities a foreign unfair trade practice. Our antidumping laws can help prevent predatory pricing. Below-cost sales can drive U.S. suppliers out of the market -- allowing foreign firms to exercise monopoly power. Unfortunately, the negotiating objective of many of our foreign trading partners in the Uruguay Round is to weaken our trade laws. LICIT hopes that the Senate Commerce Committee will pay particularly close attention to any aspects of the GATT negotiations which has the potential to undermine U.S. trade laws.

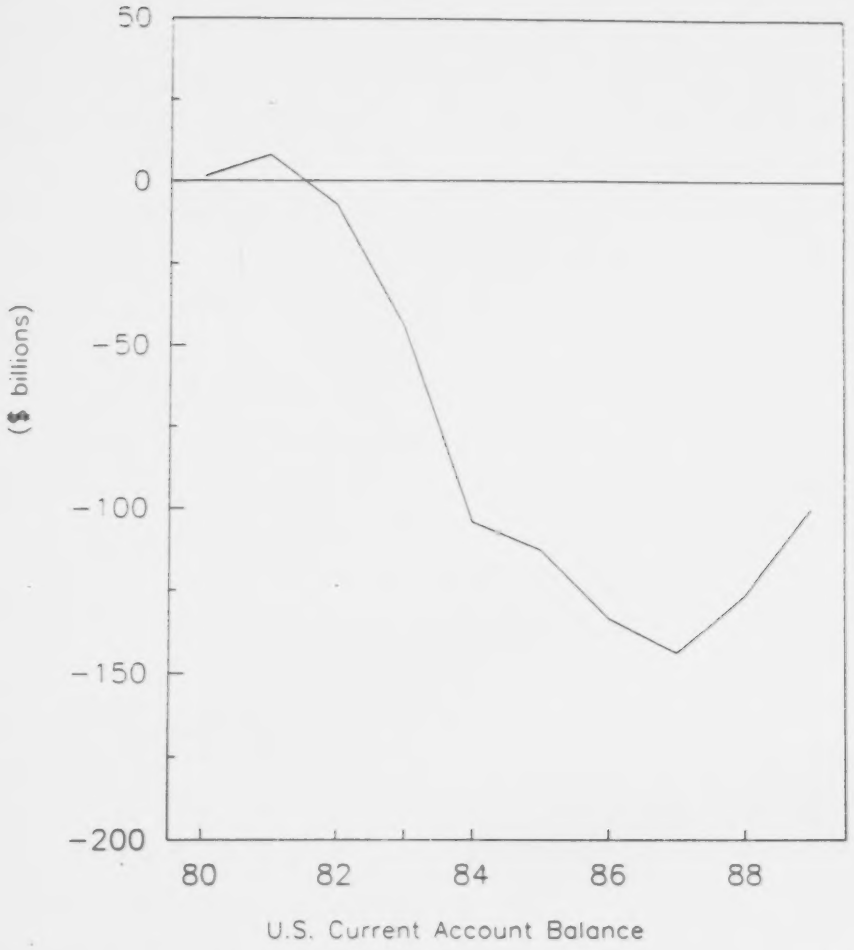
2. **Monitor Japan's compliance with commitments made in the Structural Impediments Initiative:** The SII was intended to

remove some of the structural barriers to the Japanese market, The Governrent of Japan made a number of commitments, such as an agreement to strengthen its enforcement of its Antimonopoly Act and to scrutinize the behavior of Japan's keiretsu. The United States should carefully monitor Japan's progress in reducing structural barriers.

3. **Determine whether the Federal Trade Commission and the Department of Justice have the necessary resources and legal authority to respond to foreign anticompetitive activities:** At the request of the Chairman of this Committee and other members of Congress, the Federal Trade Commission has launched an investigation on the business practices of Japanese automobile manufacturers operating in the United States. In LICIT's opinion, this is a worthwhile exercise, and if necessary, Congress should provide the FTC with additional resources to carry out this and other studies.

The Commerce Committee should also ensure that the FTC has the authority it needs to tackle all of the foreign anticompetitive practices that can reasonably be addressed by U.S. antitrust laws. An expanded role for U.S. antitrust law in this area is beginning to gain support. Assistant Attorney General James Rill stated in an April 1990 press briefing that the Department of Justice intended "to use the full reach of the law to be sure that U.S. export opportunities are not impaired or restricted by violations of U.S. antitrust laws." James Miller

U.S. CHRONIC TRADE DEFICITS



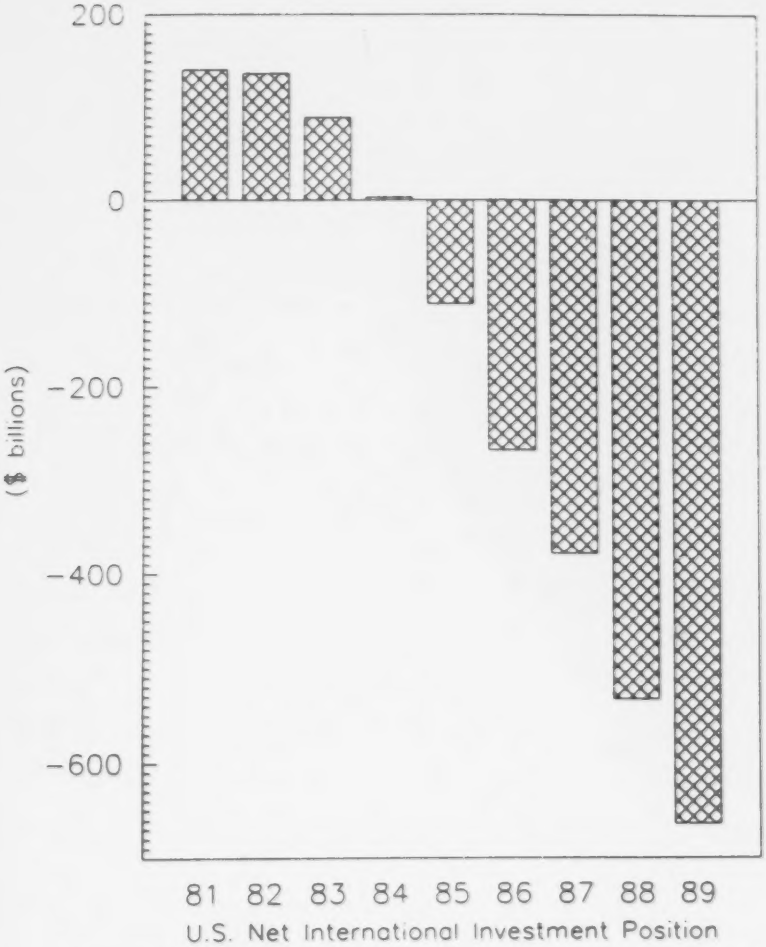
Source: Department of Commerce, Bureau of Economic Analysis

FIGURE 1

III, a former chairman of the FTC, said of Rill's suggestion: "It's a great idea, and if its successful it could work to open up some markets for US sellers."

Thank you for the opportunity to share LICIT's views on this important subject.

The United States: World's Leading Creditor to World's Largest Debtor



Source: Department of Commerce, Bureau of Economic Analysis

FIGURE 2

U.S. Share of Worldwide Electronics Markets
(1984 and 1987)

	Percent		Worldwide Market
	1984	1987	($B)
Silicon Wafers	85	22	$ >.01
Automatic Test Equip.	75	68	1.2
Semiconductor Mfg. Equip.	62	57	6.5
Microlithography Equip.	47	35	2.0
All Semiconductors	54	41	$38.1
ASICs	60	50	7.3
DRAMs	20	8	3.4
Microprocessors	63	47	1.7
Computers	78	69	$121.0
Personal Computers	75	64	47.2
Laptop Computers	85	57	1.6
Supercomputers	96	77	1.1
Computer Subsystems			
Displays	11	8	8.2
Flat Panel Displays	25	15	2.4
Floppy Drives	35	2	2.5
Hard Drives (up to 300 MB)	73	65	8.2
Hard Drives (up to 40 MB)	70	60	2.3
Dot Matrix Printers	10	8	4.8
Software	70	72	$44.5
Operating Systems	90	90	16.4
Data Base Mgmt. Systems	100	95	2.8
Spreadsheets	100	100	0.9
Telecommunications Equip.	33	32	$88.0
Central Office Switching	30	24	4.8
Fiber Optics	75	50	3.0
Private Branch Exchange	29	26	7.8
Data PBXs	100	36	0.2
Facsimile	30	25	3.1
Key Telephone Systems	28	22	5.7
Voice Mail Systems	100	100	0.6
LANs	100	98	2.4
Data Modems	49	37	3.2
Statistical Multiplexors	94	35	0.5
Instruments	52	46	$48.9
Medical Equip.	35	41	12.3
Photocopiers	40	36	$13.4
Consumer Electronics	19	12	$37.2

Source: Science & Electronics, U.S. Department of Commerce

FIGURE 3

U.S. REPORT CARD: TRENDS

	Versus Japan	Versus Europe
Losing Badly	Advanced Materials Biotechnology Digital Imaging Technology Superconductors	Digital Imaging Technology Flexible Computer-Integrated Manufacturing
Losing	Advanced Semiconductor Devices High-Density Data Storage High-Performance Computing Medical Devices and Diagnostics Optoelectronics Sensor Technology	Medical Devices and Diagnostics
Holding	Artificial Intelligence Flexible Computer-Integrated Manufacturing	Advanced Materials Advanced Semiconductor Devices High-Density Data Storage Optoelectronics Sensor Technology Superconductors
Gaining		Artificial Intelligence Biotechnology High-Performance Computing

SOURCE: Department of Commerce, Technology Administration

FIGURE 4

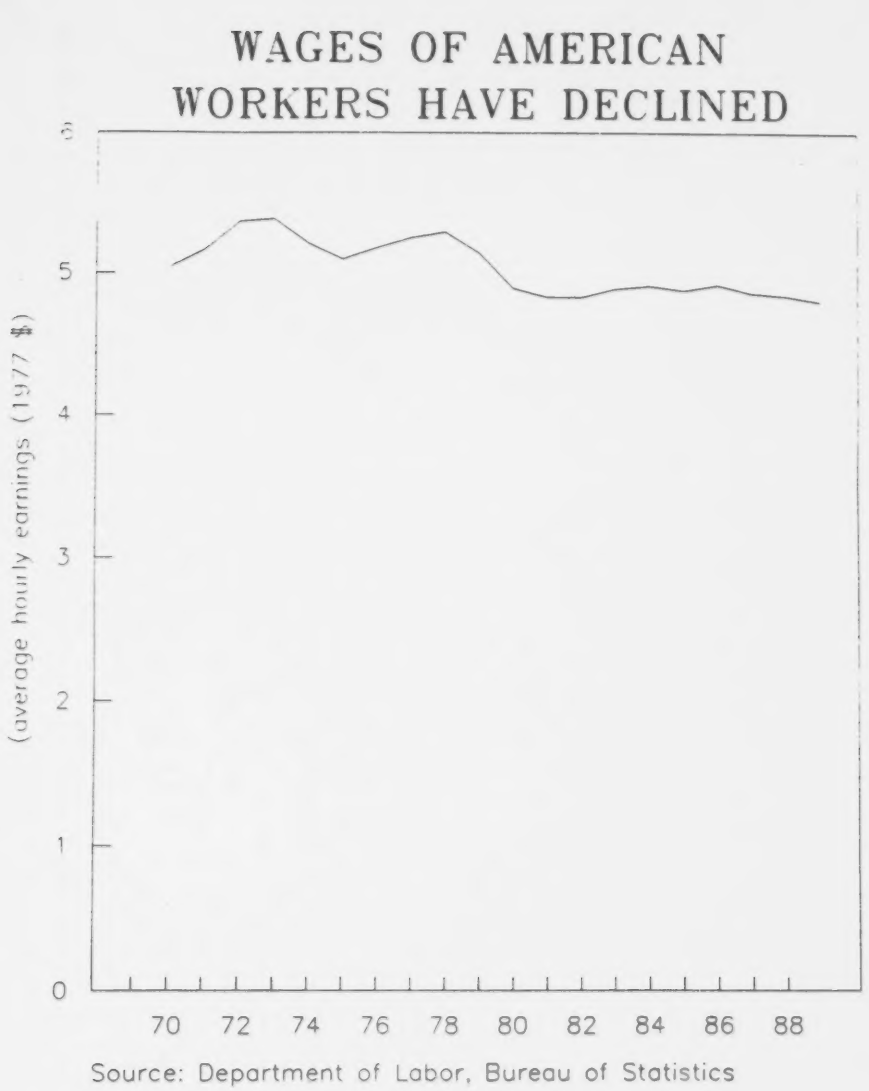
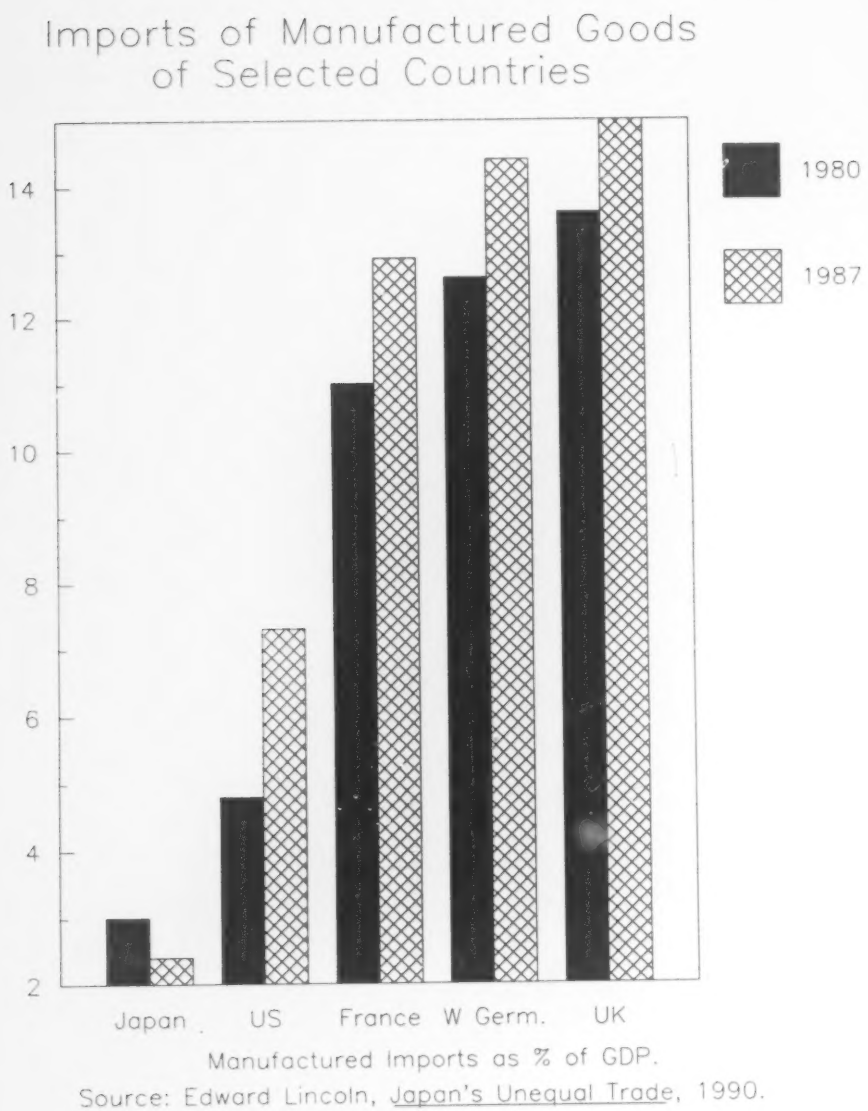
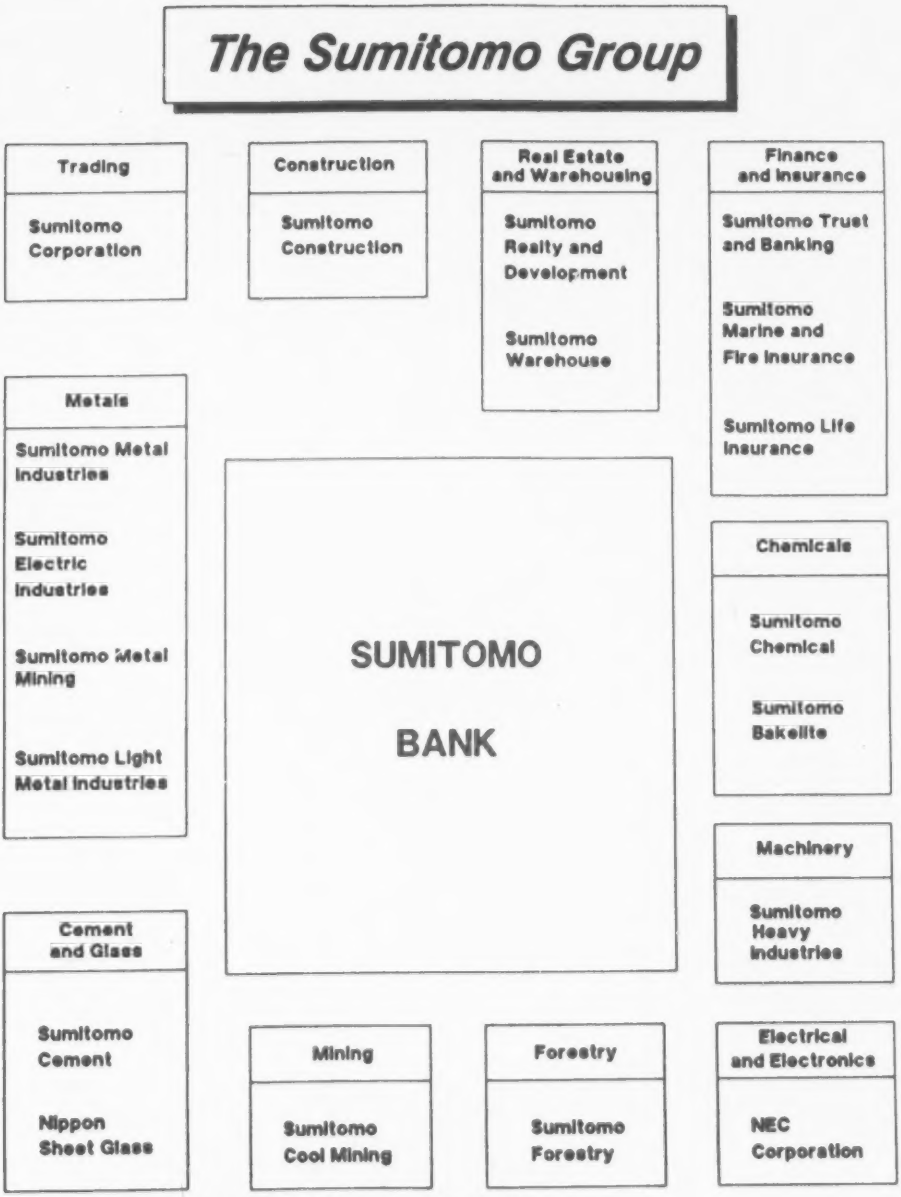

WAGES OF AMERICAN
WORKERS HAVE DECLINED
(average hourly earnings (1977 $))
0
1
2
3
4
5
70
72
74
76
78
80
82
84
86
88
Source: Department of Labor, Bureau of Statistics

FIGURE 5



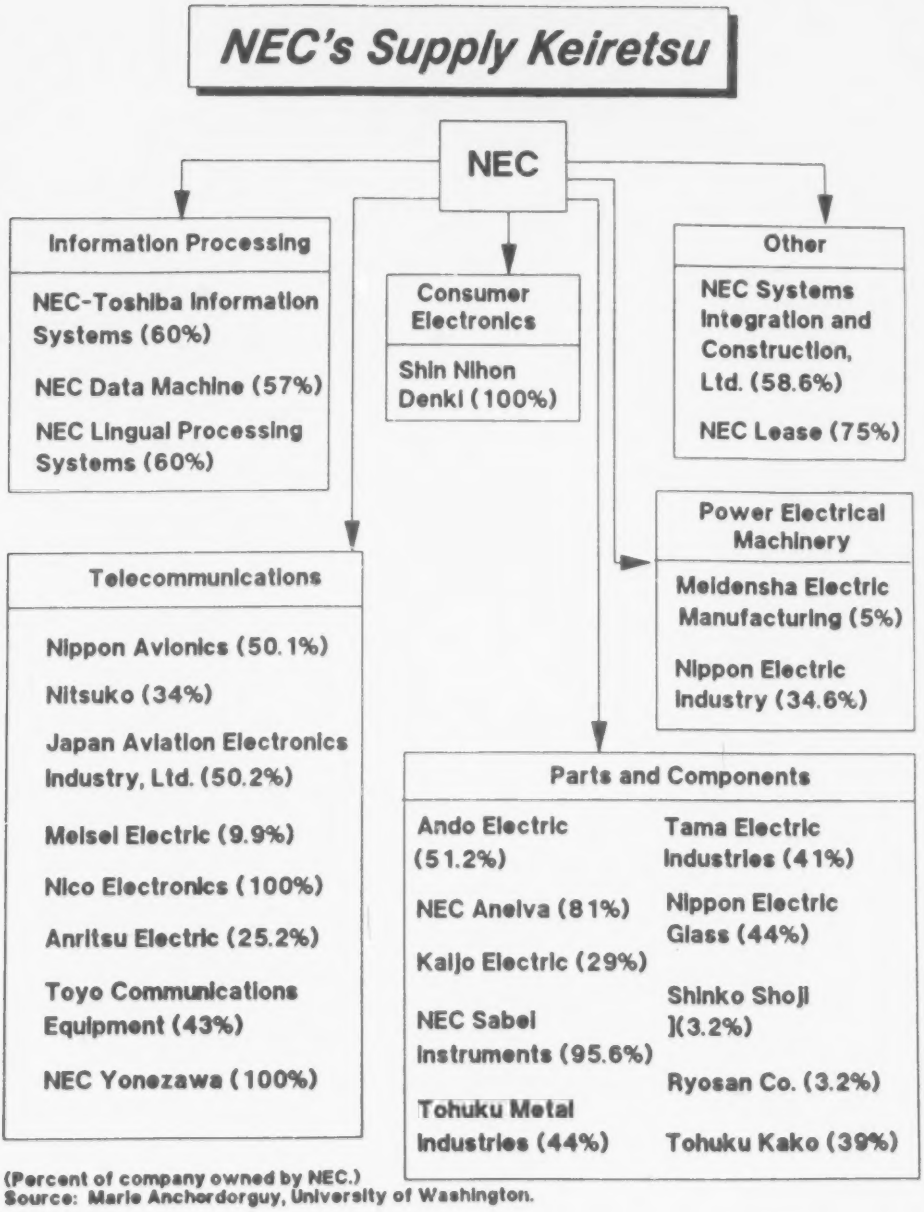
goods.drw (lc.doc)

FIGURE 6



Source: Marie Anchordoguy, University of Washington.

FIGURE 7



(Percent of company owned by NEC.)
Source: Marie Anchordorguy, University of Washington.

FIGURE 3

Senator BRYAN. Thank you very much, Mr. Turner.

Each of the witnesses has made a very strong argument for action. Mr. Huffman, as a representative of a large trade association, is it your sense that the risk that is involved to America's economy, and, more specifically, the industrial infrastructure, is something that is widely understood? Is the view that you have advanced generally shared in the business community, not just the machine tool industry but generally?

You are a businessman, you have a lot of association, I am sure, on a personal as well as a professional basis with others in the business community. Do they understand what is involved here?

Mr. HUFFMAN. Senator, I am certainly sure that those of us in the machine tool industry understand this.

Senator BRYAN. I know you do. You testified at an earlier hearing, as you know we had, where I made the observation that in 1970 you had about 100 percent of the domestic market and now that has dropped to somewhere in the neighborhood of 35 to 40 percent, if I recall.

But my question is a little broader one.

Mr. HUFFMAN. I understand that.

Senator BRYAN. You have got the message.

Mr. HUFFMAN. I understand there are two phases. Just a second on the first phase, I have been in this business now some 42 years and there are companies that I used to look up to and say: "My goodness, what beautiful, wonderful companies. "I can name maybe ten of them that are no longer in business that is shocking to me.

I am afraid that a lot of our other people that use machine tools are not as concerned about this as they should be. I think they are taking advantage of buying machine tools that are coming into this country, that are of better price and sometimes because of cartel actions, are of better quality.

I just got back from a tour of Japan last month, and I could see that these cartels have pinpointed the markets and told a group of companies, "You can have the lathe business" and told another group, "You can have the machining center business." So I think that a lot of the people in our manufacturing sector look at what they can buy, even though it comes from Japan, and are taking advantage unfair advantage of America. It is destroying our industry.

Senator BRYAN. Mr. Huffman, I think we can certainly understand that a manufacturer that is facing some very difficult competition in this global marketplace is going to look to quality and price. I do not think you are going to change that kind of conduct.

Indeed, it would probably be self-destructive from the point of view of that particular manufacturing concern. I did not, but you have, addressed the broader question. That is the existance of a system which is inherently unfair to compete against, a cartel system that systematically targets sectors of American industry with the intention of penetrating it to the point of destruction so that the Japanese can monopolize that sector. And I guess my point is, we do not seem to be getting much action from the Administration, Mr. Huffman.

Mr. HUFFMAN. The VRA's certainly have helped. If you look at the figures, once Americans were given the chance to, as Mr. Pick-

ens said, play in a fair game, we can compete. But the game has not been fair, and I think that is why we are in trouble.

Senator BRYAN. I guess my only editorial comment would be I happen to agree with you. I think your point is well taken. I have agreed with most all of what the panelists have had to say in terms of the threat that this imposes long term. When somebody that is in public office advocates that position, at a service club, a chamber gathering, a trade association, there is a tendency to say: That fellow has never been involved in the industry or the business, that is just political talk.

I understand that. I have been involved in my line of work nearly as long as you have been involved in yours, Mr. Huffman and I have come to understand that. It has far more credibility coming from you, who have labored in the vineyard for 42 years. When you go and talk to the Chamber and the Rotary Club and various trade associations make that point. We are not asking buyers to disregard the better quality or better priced product. But, long-term, understand what these practices are doing to all of us as Americans. Maybe we can get a more energized response from an Administration that, at least historically, has not been very aggressive in terms of enforcement of laws against anti-competitive practices through our antitrust laws or through some of the provisions that now exist, the Section 301 and the amended Trade Practice Act of 1988.

It is just a missionary goal that I suggest that you might be able to carry out more effectively.

Mr. HUFFMAN. I agree with you. That is one of the reasons I am here.

Senator BRYAN. Well, we appreciate you being here. The gentleman to your right looked like he wanted to speak. Could you identify yourself?

STATEMENT OF JIM MACK, VICE PRESIDENT, GOVERNMENT RELATIONS FOR THE TRADE, NMTBA

Mr. MACK. I am Jim Mack. I am vice president of Government Relations for NMTBA, the machine tool industry trade association.

Typically, when industries file petitions to seek import relief, there is a substantial body of opinion in their customer base on the other side.

When NMTBA filed its petition in 1983 seeking import relief based on the threat that imports of machine tools principally from Japan posed to the national security of the United States, a very interesting thing did not happen. What did not happen was that no organized business community opposition to our petition emerged.

We believe no opposition emerged for a very simple reason. Although this does not always happen in practice among people make buying decisions, I think that there was a recognition among most people in our customer base that, if the United States ever becomes foreign source dependent for machine tools, they are at risk; because they will then forever be dependent on that level of technology that Japan or whoever it is that is dominant in machine tool production is willing to sell them. They have had examples where Japanese machine tool companies have done just that. Major auto-

mobile companies have told us that they have gone and tried to buy cutting edge technology from Japan and have been told: "Well, that is for our automobile industry. You come back and talk to us in three or four years and we will sell you that equipment at that time—but not now. Here is what we will sell you today." I think that there is a growing recognition on the part of much of American industry that if they become foreign source dependent for the tools of production, their own technological lead, where it exists, is going to be threatened.

Senator BRYAN. Well, my point simply is that the battle can be waged on several fronts.

Mr. MACK. Absolutely.

Senator BRYAN. In terms of the import, the VRA's that you are talking about that can give some relief temporarily to an industry, that is one thing.

But it seems to me that you must not attack the basic inherently unfair advantage resulting from a cartel system, which allows your competitors to systematically destroy you. I am rather shocked by the testimony that we have heard today that it is all right to bludgeon somebody to death, that is all right. We really do not give relief unless we are able to establish that there is some ability for the aggressor, the one who has set in motion the events which destroy an industry to recover his or her economic loss as a result of undercutting the market.

I think that is nonsense. That makes no sense at all in terms of public policy, it seems to me. If indeed that is a correct interpretation of the antitrust law, and the Supreme Court does make the pronouncement of what the law of the land is to be, then we ought to make some changes. I am sure you probably do not disagree with that.

Mr. Turner, let me turn to you for a moment and let you all get out of here for lunch.

Industry, labor and management, are directly at odds on a whole raft of issues which divide you and the Congress. You all battle that out at the bargaining table or in the halls of the Congress. An issue here brings you together. How effective is your group in advocating these interests in the Justice Department, the Federal Trade Commission, the Commerce Department, where you really need to have that message heard and where business and labor are in agreement? There is no fundamental or philosophical division. You are all standing together in what a lot of us think is in the best interest of the country.

Mr. TURNER. Well, you make a very important point, Senator. Our hope is that if labor and business across a very broad spectrum can agree on a policy to promote the interests of the American economy, that government should not be far behind.

Our experience, I think in Congress has been very rewarding in that regard. I think we still have some yardage yet to go with the Administration and the trade round now is our major focus in the coalition and on that one, the final score is a long way from being in. The next six months are going to be critical and the interests of Congress will be critical in what that result will be.

We have found, I think, a very heartening ability of leading business figures and labor leaders to come together on a surprisingly

broad agenda for advancing the interests of American industry and American working men and women and we certainly intend to continue working in those directions.

Senator BRYAN. Well, I would certainly encourage you. Those of us who are in public life, whether we serve in the executive branch or legislative branch of government, have a number of shortcomings which are pointed out every day and many of which we would privately acknowledge. But we do have one infallible quality. We do know how to count, whether under the old math or the new math.

To the extent that you can broaden your coalition and bring more converts to the cause, that will, I respectfully suggest to you, have a proportionate impact on getting that ball moved down the field and punching it into the end zone. That means a victory at the trade rounds, and more aggressive action by the FTC, and a more enlightened policy in the Department of Justice. On that note, I would like to thank each of you for being here today. We appreciate very much your time and testimony. This subcommittee hearing is adjourned and the subcommittee stands in recess.

[Whereupon, at 12:07 p.m., the subcommittee was adjourned.]

[The following information was subsequently received for the record:]

The American Electronics Association
Testimony before the Senate Commerce Committee
Consumer Subcommittee
Washington D.C.
July 19, 1990

This committee is doing important work today. Today you, as members of this committee, are coming to grips with an issue that has been slowly gnawing away at the economic vitality of America. Today you are addressing a key international trade problem facing this country, ensuring that our companies have fair and open market access in Japan by exploring the extent to which U.S. anti-trust laws can address anti-competitive international trade practices.

The American Electronics Association is pleased to present testimony this morning regarding Japan's trade practices and the ways in which U.S. anti-trust law may address them. AEA represents over 3,500 electronics companies from all over the nation in all segments of electronics, including computers, telecommunications, software, and components. The U.S. electronics industry is one of the fastest growing sectors in the U.S. economy, employing some 2.5 million workers, more than autos and steel combined. Products produced by our industry are vital to our national security and critical to the growth of other sectors of the economy. In fact, electronics is so important that other nations have targeted

this $650 billion sector for concerted national efforts to gain global market share.

While some of our industry is healthy, we are extremely concerned with the longer-run trends, and with those segments of our industry that are in trouble. Our global market share in many segments is shrinking rapidly, and most of this market share loss has been to Japan. In 1989, the U.S. had a $20.23 billion electronics trade deficit with Japan. The sectors accounting for the largest deficits are computers and related products, consumer electronics, and telecommunications. Electronics trade represents about 40% of the total U.S. bilateral deficit with Japan. The report to the U.S.-Japan Business Council prepared by Quick, Finan, & Associates, estimates that if recent trends continue, the electronics deficit with Japan could grow to $39.7 billion by 1993.

We compete, both at home and abroad, in a tough marketplace. We have no problem with tough competition if it is fair. A major impediment to U.S. companies selling in the Japanese market is the toleration of anti-competitive behavior in that market. Open market access to Japan is fundamental, not only to insure that U.S. electronics companies compete on a level playing field with their Japanese competitors, but to correct the enormous, and growing, trade deficit with Japan. To date, there has been little recourse for U.S. companies competing

with cartel-like behavior by a group of Japanese manufacturers and their captive distributors.

Anti-competitive behavior in Japan is the underpinning of many of the problems facing U.S. companies in that market. A significant problem for U.S. electronics companies in the Japanese market has been the exclusionary effects of the Japanese distribution system. American firms doing business in Japan are hampered by discriminatory criteria for their products to qualify for distribution, and exclusionary financing and rebate practices within distribution channels. Powerful Japanese manufacturers frequently control the downstream distributors which handle their products which allows them to prevent these distributors from carrying competitive products. When faced with an opportunity to distribute foreign products, distributors are often threatened by major Japanese manufacturers with the withdrawal of key products.

A related problem facing American firms doing business in Japan is the "keiretsu" structure wherein most business in Japan is conducted. As you probably know, virtually all of Japan's top city banks, trust banks, insurance companies, computer, telecommunications, and semiconductor companies are members of one of the six financial keiretsu. Members of a keiretsu rarely compete against each other. The keiretsu

permits its member firms to have preferential purchasing relationships with each other. Several U.S. electronics companies have been in situations where their Japanese customers are in the same keiretsu group as competing Japanese manufacturers. Typically, the Japanese customers choose to purchase inferior products made in the same keiretsu rather than more advanced equipment made by an American company. Even more significant is the fact that these keiretsu give their member companies access to the kind of capital resources needed for the long-term advanced research critical for companies in our industry to stay technologically competitive.

An example of the result of private anti-competitive behavior in Japan is the semiconductor industry. The foreign share of Japan's semiconductor market has shown little improvement despite changes in the exchange rate and greatly intensified efforts by U.S. manufacturers to penetrate the Japanese market. One reason is that huge vertically integrated firms that both produce and consume semiconductors represent a large portion of the semiconductor market in Japan. Additionally, other major users, such as the automotive and telecommunications industries, are generally unwilling to purchase from non-Japanese sources. For example, the U.S. supplies 60-70% of the automotive industry's needs for semiconductors outside of Japan. In Japanese automotive companies, worldwide, however, our market share is only 1

percent.

We were pleased with the progress made with the recent Structural Impediments Initiative (SII), however, we believe that it is important for the Administration to continue to work with Japan to insure the implementation and monitoring of the concessions made. We were pleased that the Government of Japan has agreed to take more formal actions against activities violating the Anti-monopoly Law, including increasing the surcharges against cartels and group boycotts and allowing damage remedy suits for injured parties. We were also pleased that the JFTC will make a special effort to take formal actions, including criminal penalties, against price cartels, supply restraint cartels, market allocations, bid-riggings and group boycotts. The SII final report states that "the JFTC will ensure that private damage remedy can be utilized effectively when the JFTC finds that a trade association has violated the Anti-monopoly Act." According to USTR Ambassador Linn Williams, current Japanese law allows private right of action, but there has not been a successful case to date. This is largely because private plaintiffs have not had the right of discovery, and because the burden of proof has been on the private plaintiff not on the JFTC. The Japanese have committed to facilitating this process, but it will largely remain an area to be fleshed out in the follow-on talks.

U.S. companies still do not have the ability to file private antitrust suits in the Japanese market nor do they have access to a civil discovery process for such cases. As you know, over 90% of antitrust cases in the U.S. are filed by private entities, rather than by the government. Such changes to the Japanese system will ultimately be critical to dealing with the problem of anti-competitive behavior in the Japanese market.

With regard to distribution practices, we were pleased with the creation of an import board to present concerns of importers and foreign business to the Prime Minister and his trade council, the JFTC issuance of specific anti-monopoly guidelines on unlawful practices in distribution, and the JFTC pledge to enforce premium restrictions so that they do not impede foreign entry. We would like to see uniform rather than selective enforcement of laws and regulations, a barring of exclusionary financing within the distribution channels, and most importantly the creation of an effective private cause of action under Japanese antitrust law for refusal to deal.

We hope these commitments by the Government of Japan will be implemented to the spirit as well as to the letter of the agreement. Although we are pleased that the Japanese have

committed to a more aggressive enforcement of their antitrust laws, we will be extremely angry if this enforcement takes the form of malicious compliance, with the JFTC directing its antitrust actions against U.S. companies in Japan.

Despite SII, the U.S. electronics industry needs additional leverage to assist it to deal with the problems that it faces in the Japanese market. We believe this help can be found, not only in talks and agreements with Japan, but in the use of our own legal system. Using American anti-trust laws is a tremendous advantage for the American electronics industry, as well as other industries willing and able to compete fairly in the global marketplace. U.S. antitrust law must apply to all foreign firms operating in the United States. While we should also explore the use of U.S. antitrust laws to address anti-competitive practices in the Japanese market that adversely impact U.S. firms, we believe that it is important to tread carefully when considering the impact of using antitrust laws to address market access issues in other countries. In exploring such usage there are some very serious concerns regarding extraterritoriality that must be addressed, as well as concerns regarding retaliation by our key trading partners.

Assistant Attorney General for Antitrust James Rill has stated that it is a core principle of U.S. economic policy that antitrust as well as antitrust enforcement enhance efficiency

and competitiveness of U.S. industry as well as contribute to open markets at home and abroad. This same core principal, although legally mandated in Japanese antitrust laws, is not followed in practice. Because Japan has not stringently enforced its own anti-monopoly legislation, American electronics firms have been subject to price-fixing, tying arrangements, bid-rigging, fixed market allocation, and group boycotts. Enforcing U.S. antitrust law to deal with anti-competitive practices of Japanese firms places U.S. firms on a more level playing field in the international trade arena. Most importantly, it will give American firms additional leverage to ensure compliance with the rules of the game.

The recent experience of an American VCR developer perfectly illustrates the monopolistic and exclusionary practices rampant in Japan. A small Arizona electronics company, Go Video, developed a new VCR which, in effect, combined two video cassette players in one. This machine -- called the VCR 2 -- is able to duplicate tapes without noticeable loss of quality and allows the viewer to watch one tape while recording another.

Developing the technology for this dual-deck video player, however, was the least of the Arizona firm's problems. The real problem came in facing the concerted, collusive opposition to the dual-deck's manufacture by Sony, Matsushita

and other giant Japanese electronic firms. Because no American company had the capability to produce the VCR or its components, Go Video approached the Japanese. Despite reaching an initial agreement with NEC, the American developer learned that Japan's Electronic Industry Associate had unilaterally decided that no dual-deck video players would be produced or distributed, nor would any components for such a product be sold.

Not to be deterred by this roadblock, Go Video filed suit against the individual Japanese companies under American antitrust laws claiming illegal conspiracy to prevent the marketing of dual decks in the United States. The court rejected the Japanese defendants claims that, as foreign entities, they were outside American jurisdiction, and eventually awarded the American firm a $2 million settlement.

The lawsuit also initiated an arrangement with a South Korean defendant who agreed to manufacture dual decks as part of the settlement. Sadly enough, most American firms do not have happy endings when confronting obstructionist Japanese trade practices. Most American firms have neither the financial resources nor the legal wherewithal to combat Japanese giants determined to use any available means, including dilatory tactics in our own judicial system, to retain their grip on the electronics industry.

The Go Video case illustrates the power using antitrust laws can provide. Using U.S. antitrust laws against Japanese companies in the United States to deal with anti-competitive practices provides a much needed stick in dealing with Japan, and gives U.S. companies much needed leverage. Even more important is the hope that the initiation of antitrust cases against Japanese companies in the U.S. market will have a strong deterrent effect against collusive and monopolistic behavior by Japanese companies.

We at the AEA were particularly heartened that your committee together with the House Judiciary Committee have embarked on an effort to bring foreign firms more into the reach of U.S. antitrust law by asking the FTC to investigate charges that Japanese carmakers are bringing their keiretsu corporate relationships to the United States. The FTC Chairwoman Janet Steiger announced on May 3 that the Commission will examine allegations that the U.S. subsidiaries of Japanese carmakers are purchasing their car parts only from Japanese parts companies.

We further commend Chairwoman Steiger's assurances that there will be no exemption from antitrust laws for foreign companies whose business practices harm or threaten U.S. markets or consumers. AEA believes that the interrelationships among

keiretsu members result in discriminatory pricing practices, tying arrangements, cross-shareholding, and other exclusionary practices. AEA believes that such practices clash with the spirit and letter of U.S. antitrust law, and anxiously awaits the results of the FTC's investigation.

We are also pleased that are own Department of Justice is considering a significant extension of U.S. antitrust laws to strike at American subsidiaries of foreign companies found to be engaging in price fixing, carving up of markets, and other anti-competitive behavior in their markets. We would also like to see the JFTC move aggressively to intensify its own antitrust enforcement. We applaud the JFTC investigation last year, at the prodding of the U.S. Justice Department, of allegations of bid-rigging by 140 companies at the Yokusuka Naval Base. The practice was found to have hurt U.S. construction companies, and the Japanese were assessed fines of $37 million. Once again, however, we fervently hope that this new aggressiveness by the JFTC will not be used in a malicious fashion against U.S. firms.

AEA believes that it is also worthwhile to explore the use of U.S. antitrust laws to deal with the price-fixing practices of the Japanese cartels in the American marketplace. In this vein, we were pleased to see New York state's investigation of price-fixing in consumer electronics industry. A recent

settlement with Panasonic obligates the company to pay $8.5 million as a rebate to its U.S. customers. The New York Attorney General is continuing to investigate other Japanese consumer electronics companies on price-fixing charges.

In addition to addressing the anti-competitive aspects of Japan's marketplace, we must use our antitrust laws to fashion solutions that will allow U.S. companies to compete effectively in the international marketplace. It is a fact of life that as various digital technologies merge in the next 5-10 years, there will be a consolidation of some sort in the electronics industry. We need to insure that our companies can form pro-competitive partnerships to match capital with technology and to match the global reach of the large U.S. companies with the innovation of our small companies. We are not speaking of trying to duplicate Japan's level of vertical integration or its keiretsu system, we are merely referring to encouraging limited strategic partnerships among companies to enable them to share the risks and commercialize specific advanced technologies. To this end, AEA has stated that it would like to see the extension of the National Cooperative Research Act to joint manufacturing.

Many of the international antitrust issues arise because there is no international agreement on anti-competitive behavior. AEA believes that an ultimate goal of U.S. policy should be to

explore a multilateral code of conduct regarding antitrust. The SII negotiations addressed some anti- competitive issues on a bilateral basis, but did not go far enough. Ultimately, as industry becomes increasingly international, it will behoove governments to negotiate an international agreement on antitrust policy. Until that time, however, the U.S. must use its own antitrust regulations to ensure that U.S. firms are competing on an equitable playing field.